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# TREATISE

ON THE LAW GOVERNING

# INDICTMENTS

WITH

# FORMS

COVERING THE GENERAL PRINCIPLES OF LAW RELATING TO THE FINDING, REQUISITES AND SUFFICIENCY OF INDICTMENTS, COMBINED WITH FORMS WHICH HAVE RECEIVED JUDICIAL APPROVAL

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# PREFACE

In the United States Constitution and in the constitutions of the various states provisions, the origin of which may be found in the Magna Charta, were early incorporated which secured to an accused the right to a presentment or indictment by the grand jury. Although to some extent the mode of prosecution by indictment has been superseded by prosecution by information, yet it is only to a slight extent that this is true, and at the present day the former mode is generally followed.

In this connection questions as to the power and jurisdiction of the grand jury to act and especially as to the sufficiency of the charging of the offense have been and are continually before the courts for determination.

It has been the purpose of the author in this work to present the general principles as to the finding, requisites and sufficiency of indictments with their application to indictments for specific offenses, and also to give forms for which there is a daily need. The accomplishment of this purpose has required a vast amount of labor. Several thousand cases have been personally examined by the author and nearly six thousand citations are given. The forms are, with very few exceptions, those which have either received judicial approval in cases in which the question of their sufficiency has been before the court for determination or those which have been used in cases in which the question of their sufficiency has not arisen, thus leaving the pleader in no uncertainty as to the safety of following a given form.

Trusting that this work will be a practical aid and of value to the profession, the author respectfully submits it for consideration. HOWARD C. JOYCE.

New York, April, 1908.

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# LAW OF INDICTMENTS.

#### CHAPTER I.

#### DEFINITIONS, NATURE AND CHARACTER.

#### Section

- 1. Indictment defined.
- 2. Presentment defined.
- 3. Presentment distinguished from indictment.
- 4. Accused may be tried on presentment of grand jury.
- 5. Information defined.
- 6. Information distinguished from indictment.
- Prosecution by information at common law and in absence of constitutional or statutory provision authorizing.
- 8. Word information in Constitution construed with reference to common law.
- 9. Object of indictment.
- 10. Nature and character of indictment.
- Indictment as used in Constitution or statute construed with reference to common law.

Section 1. Indictment defined.—Indictment, which is said to be derived from the French word enditer, signifying to indicate or point out, may be generally defined as a formal accusation in writing, made under oath by a grand jury, charging a designated

1. "Indictment cometh of the French word enditer and signifieth in law an accusation found upon an inquest of twelve or more upon their oath." 3 Cokes Litt., p. 553.

"The word indictment is said to be derived from the old French word

inditer, which signifies to indicate; to show or point out. Its object is to indicate the offense charged against the accused." Bouvier's Law Dict. Title "Indictment," quoted in Williams v. State, 12 Tex. App. 395, 398.

person or persons with the commission of a crime and stating the nature of the offense charged.<sup>2</sup>

2. United States.—"The indictment is the charge of the State against the defendant, the pleading by which he is informed of the fact and nature and scope of the accusation." In re Wilson, 140 U. S. 575, 11 S. Ct. 870.

Alabama.—Mose v. State, 45 Ala. 421.

Arkansas.—"An indictment is a written accusation of one or more persons of a crime or misdemeanor presented to and preferred upon oath or affirmation, of a grand jury legally convoked." State v. Cox, 8 Ark. 436, 442.

Kentucky.—An indictment is "an accusation in writing, found or presented by a grand jury to the court in which they are impaneled, charging a person with the commission of a public offense." Blyew v. Commonwealth, 12 Ky. Law Rep. 742, 743, 15 S. W. 356, quoting § 118 Ky. Crim. Code.

Maryland.—An indictment is nothing more than a plain brief narrative of an offense committed by any person, and the necessary circumstances that concur to ascertain its fact and nature. Richardson v. State, 66 Md. 205, 210, 7 Atl. 43, quoting Lord Hale in his Pleas of the Crown, p. 168.

Michigan.—An indictment is a plain, brief and certain narrative of the offense. Alderman v. People, 4 Mich. 414, 424, 9 Am. Dec. 321.

Missouri.—" An indictment is an accusation at the suit of the king (or

State), by the oaths of twelve men (at the least, and not more than twenty-three), of the same county wherein the offense was committed, returned to inquire of all offenses in the county, determinable by the court in which they are returned, and finding a bill brought before them to be true." Ex parte Slater, 72 Mo. 102, 106, citing 5 Bacon Abridgement, p. 48

Nevada.—State v. Chamberlain, 6 Nev. 257.

New York.—"An indictment is an accusation from a body charged and sworn to investigate crime upon the oath of witnesses." People v. Dorthy, 20 App. Div. (N. Y.) 308, 320, 46 N. Y. Supp. 970; An indictment is a brief narrative of the offense charged, which must contain a certain description of the crime and the facts necessary to constitute it. People v. White, 24 Wend. 520, 570; People v. Gates. 13 Wend. 311, 317; Lambert v. People, 9 Cow. 578, 609.

North Carolina.—State v. Morris, 104 N. C. 837, 839, 10 S. E. 454. An indictment is defined by Mr. Blackstone to be a written accusation against the individual charged—it is, in substance, the declaration of the State, setting forth the offense of which she complains." State v. Walker, 32 N. C. 234, 236, per NASH, J.

South Carolina.—State v. Faile. 43 S. C. 52, 20 S. E. 798; "An indictment is an accusation or declaration at the suit of the king, for some offense found by a proper jury of twelve-

§ 2. Presentment defined.—A presentment is the notice taken of an offense in the form of a report or accusation, by a grand jury, either upon their own observation or knowledge or on evi-

men." State v. Starling, 15 Rich. L. (S. C.) 120, 123.

**Tennessee.**—Campbell v. State, 9 Yerg. 333, 335, 30 Am. Dec. 417.

Texas.—"The written statement of a grand jury accusing a person, therein named, of some act or omission, which, in law, is declared to be an offense, setting it forth in plain and intelligible words, and stating everything which it is necessary to prove with such certainty as will enable the accused to plead the judgment that may be given upon it, in bar of any prosecution for the same offense." Huntsman v. State, 12 Tex. App. 619, 636, per Hurt, J.

An indictment is defined by Blackstone as "a written accusation of one or more persons, of a crime or misdemeanor, preferred to and presented upon oath by, a grand jury." 4 Blackstone's Comm. 302. This definition has been quoted in the following cases:

Arkansas.—State v. Whitlock, 41 Ark. 403, 406.

Colorado.—Board of County Commrs. v. Graham, 4 Colo. 201, 202. Connecticut.—Goddard v. State, 12 Conn. 448, 452.

Georgia.—Hawkins v. State, 54 Ga. 653, 657.

Missouri.—State v. Carr, 142 Mo. 607, 610, 44 S. W. 776.

Nevada.—State v. Millain, 3 Nev. 409, 439.

Ohio.—Wolf v. State, 19 Ohio St. 248, 255; Lasure v. State, 19 Ohio

St. 43, 50; Lougee v. State, 11 Ohio 68, 71.

West Virginia.—Statev. Schnelle, 24 W. Va. 767, 774.

In Hawkins Pleas of the Crown the following definition is given: "An indictment is an accusation at the suit of the king, by the oath of twelve men of the same county, wherein the offense was committed. returned to inquire of all offenses in general in the county, determinable by the court into which they are returned, and finding a bill brought before them to be true." 2 Hawkins Pleas of the Crown, c. 25 (1), quoted in In the Matter of Grosbois, 109 Cal. 445, 42 Pac. 444; Mack v. People, 82 N. Y. 235, 236.

Code Definitions .- " An indictment is an averment in writing made by a grand jury legally convoked and sworn, that a person therein named or described has done some act, or been guilty of some omission, which by law is a public offense." § 2915 Iowa Code, quoted in Norris' House v. State, 3 G. Greene (Iowa), 513, 517. "An indictment is an accusation in writing, presented by a grand jury to a competent court, charging a person with a crime." New York Code Crim. Prac., § 254, quoted in Matter of Jones v. People, 101 App. Div. (N. Y.) 55, 92 N. Y. Supp. 275; People v. Flaherty, 79 Hun (N. Y.), 48, 50, 29 N. Y. Supp. 641; People v. Stark, 59 Hun (N. Y.), 51, 58, 12 N. Y. Supp. 688. "An indictment is the

dence before them, which usually serves as the basis for framing an indictment.3

written accusation of the grand jury, accusing a person therein named of some act, or omission, which, by law, is declared to be an offense." Tex. Code Crim. Proc., art. 419, quoted in Williams v. State, 12 Tex. App. 395, 399. In Hewitt v. State, 25 Tex. 722, the above definition is quoted by Chief Justice Roberts, who says: "At the adoption of our Constitution, and for a century previously, both in England and America, this is what was understood as constituting an indictment."

3. Arkansas.—A presentment is the notice taken by a grand jury of any offense from their own knowledge or observation without any bill of indictment laid before them at the suit of the government, upon which the prosecuting attorney must afterwards frame an indictment. State v. Whitlock, 41 Ark. 403, 406. "A presentment is the notice taken by a grand jury of any offense, from their own knowledge or observation, without any bill of indictment laid before them at the suit of the government." State v. Cox, 8 Ark. 436, 442, per OLDHAM, J.

Georgia.—"A presentment, as defined by the common law, properly speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king." Hawkins v. State, 54 Ga. 653, 657. A presentment is the notice taken by the grand jury of any offense, from

their own knowledge or observation, and into which it is their duty to inquire. Nunn v. State, 1 Ga. 243, 245.

Nevada.—"A presentment at common law was a mere informal statement of a grand jury (not prepared by a law officer of the court) calling attention to the existence of some violation of law which the jury might think needed correction." State v. Millain, 3 Nev. 409, 439, per Beatty, J.

New York .- A presentment "(1) a report made by a grand jury, on their own motion, either on their own knowledge or on evidence before them, concerning some wrongdoing, and presented to the court, usually as a basis for an indictment. (2) The finding and setting forth of charges in an indictment by a grand jury; an indictment." Standard Dictionary, quoted in Matter of Jones v. People, 101 App. Div. (N. Y.) 55, 57, 92 N. Y. Supp. 275, per JENKS, J. "A presentment is the notice taken of an offense by the grand jury from its own knowledge or observation, without any bill of indictment laid before it by the prosecuting officer of the government. Upon such presentment, when proper, the officer employed to prosecute frames a bill of indictment which is sent to the grand jury, and the latter finds it a true bill. Matter of Jones v. People, 101 App. Div. (N. Y.) 55, 62, 92 N. Y. Supp. 275, per WOODWARD, J.

North Carolina.—"A presentment is an accusation made, ex mero

'§ 3. Presentment distinguished from indictment.—The words presentment and indictment both imply the existence of a grand jury. A presentment, however, made in the ordinary way by a grand jury is regarded, in the practice at common law, as in the nature of instructions given by the grand jury to the proper officer of the court upon which an indictment may be framed. Mr. Justice Field, in his much-quoted charge to a federal grand jury in 1872,6 said, in reference to presentments: "A presentment differs from an indictment in that it wants technical form, and is usually found by the grand jury upon their own knowledge, or upon the evidence before them, without having any bill from the public prosecutor. It is an informal accusation, which is generally regarded in the light of instructions upon which an indictment can

motu, by a grand jury of an offense upon their own observation and knowledge, or upon evidence before them, and without any bill of indictment laid before them, at the suit of the government. The presentment is founded either upon facts of which the grand jury, or some member of that body, actually had knowledge, or upon specific information given in good faith and deemed by them to be credible." State v. Morris, 104 N. C. 837, 839, 10 S. E. 454. sentment is the notice taken by a grand jury of any offense, from their own knowledge or observation, without any bill of indictment before Lewis v. Board of Commissioners of Wake Co., 74 N. C. 194, 197.

**Pennsylvania.**—Commonwealth v. Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894.

"A presentment, generally taken, is a very comprehensive term; including not only presentments, properly so called, but also inquisitions of office and indictments by a grand jury.

A presentment, properly speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king." 4 Blackstone's Comm. 301.

4. State v. Barker, 107 N. C. 913, 13 S. E. 115, 10 L. R. A. 50.

5. Matter of Jones v. People, 101 App. Div. (N. Y.) 55, 92 N. Y. Supp. 275; Commonwealth v. Christian, 7 Gratt. (Va.) 631, 635.

A presentment is a proceeding preliminary to an indictment.—
In re Gardner, 31 Misc. R. (N. Y.) 364, 64 N. Y. Supp. 760, quoting from Charge to Grand Jury, 30 Fed. Cas. No. 18255, 2 Sawy. 663.

The character of a special presentment as a presentment is not changed by marking the word "indictment" thereon, and it may be given in evidence as a presentment, on the trial of the cause. Ivey v. State, 23 Ga. 576.

Charge to Grand Jury. 30 Fed.
 Cas. No. 18255, 2 Sawy. 667.

#### § 4 DEFINITIONS, NATURE AND CHARACTER.

be framed. This form of accusation has fallen in disuse since the practice has prevailed—and the practice now obtains generally—for the prosecuting officer to attend the grand jury and advise them in their investigations." And ordinarily when the indictment has been prepared by the proper officer of the court it is submitted to the grand jury and upon their finding it a true bill, the prosecution commences upon that indictment and the presentment is merged in the indictment and becomes extinct. If, however, such officer declines to frame an indictment upon these instructions it is declared that the presentment ceases to exist for any purpose.

§ 4. Accused may be tried on presentment of grand jury.-Though, as has been stated, a presentment was ordinarily regarded at common law in the nature of instructions upon which an indictment might be framed,8 yet in some jurisdictions the practice has prevailed, or at least the right been recognized, of putting the accused upon his trial upon the presentment of a grand jury, instead of requiring an indictment or information.9 So in an early case in Virginia, it is said that in the practice in that state the presentment has been allowed an efficacy not known at common law in England. It has been allowed, for many purposes, to stand in the place of an indictment; or to stand as the foundation for further proceedings against the party presented,10 and in an early case in Tennessee it was declared that "This practice has been so long followed in this State that it is now too late to question its legality, although it may not be sanctioned by established principles."11 In Georgia the distinctions between indictments and presentments was abolished by code, and the latter was made as good as the former as to arraignment and trial for violations of criminal laws.12

- 7. Commonwealth v. Christian, 7 Gratt. (Va.) 631, 635, per LOMAX, J.
  - 8. See preceding section.
- **9.** See Ivey v. State, 23 Ga. 576, 580.
- 10. Commonwealth v. Christian, 7 Gratt. (Va.) 631, 635, per LOMAX,
- J.; Commonwealth v. Towles, 5 Leigh (Va.), 743.
- 11. Smith v. State, 1 Humph. (Tenn.) 396, 398, per GREEN, J.
- 12. Groves v. State, 73 Ga. 205, construing Ga. Code, § 4632, which provided that "all special present-

§ 5. Information defined.— An information is a declaration or statement filed in behalf of the State by an officer whose duty it is to prosecute crimes, charging a person with a criminal offense.<sup>13</sup>

ments by the grand juries of this State, charging the defendants with violations of the penal laws, shall be treated as indictments, and it shall not be necessary for the clerk to enter such presentments in full upon the minutes, but only the statement of the case and the findings of the grand jury, as in cases of indictments; nor shall it be necessary for the solicitorgeneral to frame bills of indictment on such presentments, but he may arraign defendants upon such presentments, and put them upon trial in like manner as if the same were bills of indictment."

13. "The common law information was an accusation of a criminal character exhibited against a charging him or her with a criminal offense by Attorney-General or the Solicitor-General, and under his oath of office." State v. Kvle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115. An information means a prosecution instituted by some officer whose duty it is to prosecute criminal offenses. State v. Shortell, 93 Mo. 123, 5 S. W. 691; State v. Kelm, 79 Mo. 515. "An information is a declaration or statement without being made on the oath of the grand jury, whereby a person is charged with the breach of some public law or penal statute." State v. Ledford, 3 Mo. 75, 77. information (as a mode of prosecution) is a declaration of the charge or offense against any one at the suit of the king, filed by a public officer, without the intervention of a grand jury." State v. Starling, 15 Rich. L. (S. C.) 120, 123. "An information is a written statement filed and presented on behalf of the State by the district attorney, accusing the defendant of an offense which is by law subject to be prosecuted in that way." Tex. Code Cr. Proc., art. 402, quoted in State v. Corbit, 42 Tex. 88.

The affidavit of a private individual is not an information and will not support a criminal prosecution. State v. Kelm, 79 Mo. 515, cited and followed in State v. Shortell, 93 Mo. 123, 5 S. W. 691; State v. Briscoe, 80 Mo. 643.

A complaint by a tything man for a breach of the sabbath, made to a justice of the peace, is not an information or indictment within a section of a bill of rights providing that "In all criminal prosecutions, the accused shall have a right to be heard by himself or by counsel; to demand the nature and cause of the accusation; to be confronted by the witnesses against him; and to have compulsory process to obtain witnesses in his favor; and in all prosecutions by indictment or information, speedy, public trial, by an impartial iurv." Goddard v. State, 12 Conn. 448.

A statute designating a complaint an information does not change its legal effect. Lindville v. State, 3 Ind. 580.

#### §§ 6,7 DEFINITIONS, NATURE AND CHARACTER.

- § 6. Information distinguished from indictment.—An information is an accusation in the nature of an indictment from which it does not ordinarily differ in form or substance. The distinction, however, which exists between an information and indictment is in the source from whence it comes, the latter being presented by the grand jury while the former is filed by the proper public officer without the intervention of a grand jury.<sup>14</sup>
- § 7. Prosecution by information at common law and in absence of constitutional or statutory provision authorizing.— The mode of prosecution by information is said to be as ancient as the common law itself.<sup>15</sup> But under the common law prosecution by information was confined to mere misdemeanors only, and did not extend to any capital offense.<sup>16</sup> In this connection it has been said: "The only constitutional provision affecting the question is the fifth amendment, proposed
- 14. State v. Whitlock, 41 Ark. 403, 406; Goddard v. State, 12 Conn. 448; State v. Kelm, 79 Mo. 515.

"An information generally differs in nothing from an indictment in its form and substance, except that it is filed by the proper law officer of the government, ex officio, without the intervention or approval of a grand jury." United States v. Borger, 7 Fed. 193, 196, per BLATCHFORD, J., citing 2 Story on Const. (4th Ed.), § 1786.

15. "There can be no doubt that this mode of prosecution by information (or suggestion), filed on record by the king's Attorney-General, or by his coroner or master of the crown-office in the court of king's bench, is as ancient as the common law itself." 4 Blackstone's Comm. 309; Davis v. Burke, 179 U. S. 399, 21 S. Ct. 210, 45 L. Ed. 399.

16. "These informations (of every kind) are confined by the constitutional law to mere misdemeanors only; for, whenever any capital offense is charged, the same law requires that the accusation be warranted by the oath of twelve men; before the party shall be put to answer it." 4 Blackstone's Comm. 310.

See State v. Whitlock, 41 Ark. 403, 406, wherein it is said that this proceeding by criminal information comes from the common law without the aid of statutes and is allowable by the common law in a great variety of cases, the rule appearing to be that it is a concurrent remedy with the indictment for all misdemeanors, but not permissible in any felony. See, also, Commonwealth v. Barrett, 9 Leigh (Va.), 655; Matthews v. Commonwealth, 18 Gratt. (Va.) 989.

the same year that the original instrument went into operation — 1789. \* \* \* Congress by proposing, and the States by ratifying that amendment, left all offenses not capital or infamous to be prosecuted by information or by indictment as the circumstances of each case would seem to require, and as the common law would \* \* We regard the converse of the fifth amendsanction. ment to be that persons may be held to answer for crimes other than such as are capital or infamous, upon information or indictment, according to the course of the common law. We have examined all the cases referred to by counsel and find no well considered decision which conflicts with the views we have expressed, and therefore we conclude that, so far as the question rests on the common law, it is the right of the government, by its proper law officer, the district attorney, to charge offenses against individuals through the forms and mode of informations."17 And the fact that the prosecution of such offenses in the United States courts had fallen into disuse for a long period of time, about eighty years, during which all offenses had been prosecuted by indictment, was held not to affect the right to prosecute by information.18

§ 8. Word information in Constitution construed with reference to common law.— In construing the term information as used in a constitutional provision securing to an accused person the right of prosecution by indictment or information, resort is to be had to the common law in determining the sense in which information, as well as indictment, is used, and in such a case the Legislature is not authorized to extend its meaning and use beyond that of the common law.<sup>19</sup> The word information as used in a clause in the Constitution of a State providing for prosecution by indictment or information, is said to imply no particular form but

<sup>17.</sup> United States v. Shepard, 27 Fed. Cas. No. 16273, 1 App. (U. S.) 431, per WITHEY, J.

<sup>18.</sup> United States v. Shepard, 27 Fed. Cas. No. 16273, 1 App. (U. S.) 431.

<sup>19.</sup> State v. Kyle, 166 Mo. 287, 303, 65 S. W. 763, 56 L. R. A. 115; State v. Kelm, 79 Mo. 515; State v. Ransberger, 42 Mo. App. 469; State v. Rockwell, 18 Mo. App. 395.

only to require that the accused shall be informed therein of the nature of the offense of which he is charged, and put upon his trial.<sup>20</sup>

- § 9. Object of indictment.— The object of an indictment is two-fold: First, to inform the defendant of the offense with which he is charged with such particularity as will enable him to prepare for his trial; second, so to define and identify the offense that the defendant may, if convicted or acquitted, be able to defend himself, in case he be indicted again for the same offense, by pleading the record of such conviction or acquittal.<sup>21</sup>
- § 10. Nature and character of indictment.— An indictment, which is a technical word peculiar to Anglo-Saxon jurisprudence and which implies the finding of a grand jury,<sup>22</sup> is in its nature a prosecution, though prosecution standing by itself has a larger signification.<sup>23</sup> It has also been held to be a judicial proceeding within the meaning of a statute in reference to such proceedings.<sup>24</sup> And in England it has been decided that the word indictment comprehends a coroner's inquisition. This rule was applied in construing a statute<sup>25</sup> which provided that "in any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner or the means by which the death of the deceased was caused."<sup>26</sup>
- 20. Clapper v. State, 4 Tex. 242, 245
- 21. United States v. Loring, 91 Fed. 881, 884.
- 22. Grin v. Shine, 187 U. S. 181, 192, 23 S. Ct. 98, per Mr. Justice Brown; Eason v. State, 11 Ark. 481.
- 23. Commonwealth v. Haas, 57 Pa. St. 443.
- 24. Indictment a judicial proceeding.—In a case in North Carolina in 1867 it was decided that an indictment was a judicial proceeding within the meaning of the Ordinance of the Convention of 1865, which validated the proceedings of

the courts of the de facto government during the period of the attempted secession from the Union as follows: "All the judicial proceedings had, or which may be had, in the courts of record, and before justices of the peace, shall be deemed and held valid, in like manner, and to the same extent, and not otherwise, as if the State had not on the said day, or since, attempted to secede from the United States." State v. Sears, 61 N. C. (Phillipps L.) 146.

25. 24 and 25 Vict. c. 100.

26. Queen v. Ingham, 5 Best & S. 257, 270; 9 Cox Crim. Law Cas. 508, 511; 117 Eng. Com. Law. 257.

The remedy by indictment is one for the redress of public injuries and may ordinarily be filed in those cases where an offense is created and punishment imposed unless excluded by the terms of the Constitution or statute.<sup>27</sup> At common law every act contra bonos mores is said to be an indictable offense.<sup>28</sup> An indictment will not, however, lie for a mere civil injury.<sup>29</sup>

§ 11. Indictment as used in Constitution or statute-Construed with reference to common law .- The words "indictment" or "presentment" are common law terms and as used in a constitution or statute are to be construed, in the absence of anything to the contrary, in their common law sense.30 So in a case in Missouri it is said "the word indictment has a well-defined meaning, and must be accepted and understood as having been inserted in the Constitution with the meaning attached to it at common law."31 And in a Florida case it is declared that, in determining the meaning of a provision in the Bill of Rights that "no person shall be tried for a capital crime or other felony, unless on presentment or indictment by a grand jury" it is "not only proper, but necessary, that we recur to the principles of the common law, from which we derived not only our grand jury system, but in fact the right of jury trial, as well as the body of our municipal law."32

27. Louisville & N. R. R. Co. v. Commonwealth, 112 Ky. 635, 642, 66 S. W. 505.

28. State v. Williams, 7 Rob. (La.) 252.

29. Rex v. Atkins, 3 Burr, 1706; Rex v. Storr, 3 Burr, 1698; Rex v. Osborn, 3 Burr, 1697. See State v. Deherry, 5 Ired. L. (N. C.) 371, wherein it is declared that it is only when the act or acts done by a person, or the omission to act by a person, who by law ought to act, operate to the annoyance, detriment or

disturbance of the public at large that the offender becomes amenable to the public by way of indictment at common law.

30. Mott v. State, 29 Ark. 147; Eason v. State, 11 Ark. 481; English v. State, 31 Fla. 340, 12 So. 689; State v. Kyle, 166 Mo. 287, 303, 65 S. W. 763, 56 L. R. A. 115.

31. Ex parte Slater, 72 Mo. 102, per Norton, J.

32. English v. State, 31 Fla. 340, 345, 12 So. 689, per MARRY, J.

#### CHAPTER II.

#### RIGHT TO AND NECESSITY OF INDICTMENT.

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- § 12. Right to and necessity of indictment generally.—Under the provision of the United States Constitution protecting every one from being prosecuted without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment, no declaration of Congress is needed to secure, or competent to defeat, the constitutional safeguard.¹ And when an act is made the subject of a criminal charge, the constitutional provision requiring an indictment or information is at once brought into active force in favor of those who are accused of and prosecuted for said act; and if an indictment be preferred, it must be such an one as the framers of the Constitution contemplated. Such an indictment then becomes one of the steps in the prosecution "in the due course of the law of the land."

Neither a constitutional provision that a person must be prosecuted by indictment for a capital or otherwise infamous crime,

<sup>1.</sup> Ex parte Wilson, 114 U. S. 417, 2. Hewitt v. State, 25 Tex. 722. 5 S. Ct. 935.

nor a statutory provision that every public offense must be prosecuted by indictment, except in certain cases, prohibits by implication the prosecution by indictment of any criminal offense.<sup>3</sup> And whenever a statute prohibits any matter of public grievance to the liberty and security of the people, or commands a matter of convenience, without enacting any penalty for disobeying its provisions, it is decided, in an early case, that those who violate its provisions may be prosecuted by indictment and punished by fine.4 But where by the Constitution indictment is necessary only in capital or otherwise infamous crimes, and is not required in cases of inferior offenses where the punishment is less than imprisonment in the penitentiary, and there is no statute which provides for indictment for violation of municipal ordinances, it is held that indictment will not lie.<sup>5</sup> And though it is provided by a statute that one who violates its provisions shall be subject to indictment this is not exclusive of prosecution by affidavit and information where it is provided by another statute that "all public offenses except treason and murder" may in certain cases be prosecuted by affidavit and information as well as by indictment.6

§ 13. Where mode of prosecution prescribed by Constitution or statute.—Where the Constitution of a State or a statute authorized by the Constitution provides the mode in which certain offenses are to be prosecuted, such mode must be followed. Therefore where it is provided that certain offenses shall be prosecuted by indictment, or by information, or by indictment or information, the mode or modes designated must be followed to the exclusion of all others. So where it is provided by Constitution or statute that information shall be the exclusive remedy for mis-

- 3. Ex parte McCarthy, 53 Cal. 413.
- 4. State v. Fletcher, 5 N. H. 257.
- 5. Finnical v. Village of Cadiz, 61 Ohio St. 494.
- 6. Miller v. State, 144 Ind. 401, 44 N. E. 440.
  - 7. United States.—United States
- v. Rounsavel, 27 Fed. Cas. No. 16199,
- 2 Cranch C. C. 133.
- Connecticut.—State v. Danforth, 3 Conn. 112, 122.
- Illinois.—Gould v. People, 89 Ill. 216.
  - Indiana.—Butler v. State, 113

demeanors committed in a certain county, the remedy prescribed must be pursued and prosecution by indictment is excluded.<sup>8</sup> And

Ind. 5, 14 N. E. 247; State v. First,
82 Ind. 81; Allstodt v. State, 49 Ind.
233; Jackson v. State, 48 Ind. 251;
Bryne v. State, 47 Ind. 120; State v.
Benson, 38 Ind. 60.

Nevada.—Ex parte Dela, 25 Nev. 346, 60 Pac. 217.

South Carolina.—State v. Mitchell, 1 Bay (S. C.) 267.

All criminal cases originating in the criminal or circuit courts of Indiana must be prosecuted either upon an indictment or affidavit and information. Butler v. State, 113 Ind. 5, 14 N. E. 247.

All offenses except treason and murder may, in Indiana, in certain cases be prosecuted by affidavit and information as well as by indictment. Miller v. State, 144 Ind. 401, 43 N. E. 440; Kennegan v. State, 120 Ind. 176, 21 N. E. 917.

Where statute requires indictment if punishment exceeds seven years.—Where it is provided that all crimes except those punishable by death and those of which the punishment exceeds seven years, may be prosecuted by information, if the punishment for an offense may exceed seven years it can not be prosecuted by information. State v. Magoon, 61 Vt. 45, 17 Atl. 729.

Provision not applicable to proceedings to compel payment of debt.—A constitutional provision that "prosecutions shall be by indictment or information" relates only to criminal proceedings and not to proceedings having for their object the imprisonment of a person to com-

pel the payment of a debt and to proceedings against an insolvent debtor for fraud, which are in their nature civil. Martin v. Chrystal, 4 La. Ann. 344. See § 10 herein.

Repeal of statute.—A general statute providing for the prosecution of certain offenses which are misdemeanors, by indictment, is repealed by a subsequent statute which provides for the prosecution of all misdemeanors by information. Territory v. Cutinola, 4 N. M. 160.

Statute not a local and special law.—An act providing for the prosecution of felonies by affidavit and information in certain cases is held in Indiana not to be a local and special law, but one of general and uniform operation throughout the State, and constitutional. Fox v. State, 76 Ind. 243; Sturm v. State, 74 Ind. 278; Jones v. State, 74 Ind. 299.

Under the New York Law forfeiting a liquor tax certificate for two convictions (Liquor Tax Law, § 34, subd. 3, Laws 1897, p. 238, c. 312), where an agent is prosecuted a second time it should be by indictment. People v. Hoenig, 86 N. Y. Supp. 673; People v. Gantz, 41 Misc. R. 542, 85 N. Y. Supp. 79; People v. Cornyn, 36 Misc. R. 135, 72 N. Y. Supp. 1088.

A prosecution against a sheriff for misfeasance in office, in permitting a prisoner to escape, should be by indictment. Haskins v. State, 47 Ark. 243, 1 S. W. 242.

8. State v. Stewart, 47 Mo. 382.

where the statute in reference to misdemeanors provides that a person accused of such an offense must be prosecuted by information filed by the prosecuting attorney, a prosecution founded upon an affidavit alone, no information being filed, cannot be sustained but the mode prescribed by statute must be followed. So in England it has been decided that indictment does not lie upon an act of parliament which creates a new offense and prescribes a particular remedy. 10

§ 14. Where offense created by statute—Right to and necessity of, indictment.—Where an offense is created and a particular remedy specified in the prohibitory clause creating it such remedy must be pursued.<sup>11</sup> A distinction, however, is made between those cases where a new offense is created by statute, and in the clause creating it a special remedy is prescribed and where a new created offense is prohibited by a substantive clause in a statute and in another section a special remedy is given, it being declared that in the former case the special remedy is exclusive and must be followed, while in the latter an indictment or information will lie on the prohibitory clause.<sup>12</sup> So it is

9. State v. Sebecca, 76 Mo. 55; State v. Huddleston, 75 Mo. 667.

10. Reg v. Lovibund, 24 L. T. 357, 19 W. R. 753; Rex v. Wright, 1 Burr, 543. See § 14 herein.

11. Swan v. State, 29 Ga. 616, 627; State v. Corwin, 4 Mo. 609; Journey v. State, 1 Mo. 428; People v. Hislop, 77 N. Y. 331; Lane v. Brown, 16 Wend. (N. Y.) 561; People v. Stevens, 13 Wend. (N. Y.) 341; Rex v. Mead, 1 Burr, 542, wherein Lord Mansfield said: "In newly created offenses, where there is a prohibitory, particular clause, specifying only particular remedies, then such particular remedy must be pursued. For otherwise the defendant would be liable to a double prosecution; one upon the general prohibi-

tion, and the other upon the particular specific remedy."

Where the mode prescribed is "by bill, plaint, or information," and indictment is not mentioned, it must be considered as excluded, and the word bill will not be construed to mean bill of indictment. State v. Matthews, 2 Brev. L. (S. C.) 82. But see State v. Helfrid, 2 Nott. and McC. (S. C.) 233, 10 Am. Dec. 591.

12. State v. Bishop, 7 Conn. 181, 185, citing Com. Dig., tit. Information, A. 3; Rex v. Clark, 6 Cowp. 610; Rex v. Hymen, 7 Term. R. 536. See, also, State v. Williams, 7 Rob. (La.) 257, 268, holding, however, that there is no common law in Louisiana and that one cannot be prosecuted

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said by Lord Mansfield in an early case that: "The rule is certain, 'that where a statute creates a new offense, by prohibiting and making unlawful anything which was lawful before; and appoints a specific remedy against such new offense (not antecedently unlawful), by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other.' But where the offense was antecedently punishable by a common law proceeding, and a statute prescribes, a particular remedy by summary proceeding, there either method may be pursued and the prosecutor is at liberty to proceed either at common law, or in the method prescribed by the statute; because there the sanction cumulates and does not exclude the common law punishment." 13 And it has been "The settled rule another case that: is that a statute gives a remedy in the affirmative, without containing any express or implied negative, for a matter which was actionable at common law, this does not take away the common law remedy, but the party may still sue at common law, as well as upon the statute. In such cases the statute remedy will be regarded as merely cumulative. But where a new right or the means of acquiring it is given, and an adequate remedy for violating it is given in the same statute, then the injured parties are confined to the statutory remedy."14 So where by act of the Legislature an act or omission constitutes an offense against the public it may be prosecuted by indictment unless a different mode of proceeding is expressly provided for.15

§ 15. Where fine prescribed as punishment.— Where an act is prohibited by statute and a penalty is prescribed but no mode for its recovery is specified it has been decided that an indictment will

by indictment in the latter case above mentioned; People v. Brown, 16 Wend. (N. Y.) 561.

1.3. Rex v. Robinson, 2 Burr. 799, holding that though the statute provided for the punishment of the offense for disobeying an order of sessions, an indictment would neverthe-

less lie for such offense as it was an indictable offense at common law.

**14.** State v. Bittinger, 55 Mo. 596, 599, per WAGNER, J.

15. State v. Williams, 7 Rob. (La.) 252; Keller v. State, 11 Md. 525, 69 Am. Dec. 226.

lie. 16 Where, however, the method by which it can be recovered is pointed or prescribed in the statute, and indictment is not mentioned the rule prevails at common law that an indictment will not lie and that the remedy is an action of debt. 17 So in a case in Texas it has been decided that it is "a rule of the common law, that where a statute prohibits an act which was before lawful, and enforces the prohibition with a penalty, and a succeeding statute, or the same statute in a subsequent, substantive clause prescribes a mode of proceeding for the penalty, different from that by indictment, the prosecutor may, notwithstanding, proceed by indictment, upon the prohibitory clause, as for a misdemeanor, or he may proceed in the manner pointed out by the statute at his option. But if the manner of proceeding for the penalty be contained in the same clause which prohibits the act, the mode of proceeding given by the statute must be pursued and no other."18 So an indictment will not lie for the violation of the by-law of a town where the only authority for the adoption of such by-law is a statute which authorizes towns to affix penalties for the violation of its by-laws which may be recovered on complaint before a police, district or municipal court or a trial justice. 19 But where a statute gives a recovery for a penalty by action of debt, bill, plaint, or information, or otherwise, it is decided that an indictment will lie.20 And where a city under the power delegated to it by its charter and the general laws of the State, imposes a penalty for the

**16.** State v. Meyer, 1 Spears (S. C.), 305; State v. Helgen, 1 Spears (S. C.), 310.

17. United States. — United States v. Lyman, 1 Mason, 498; Adams v. Woods, 2 Cranch, 336.

Indiana.—Durham v. State, 117 Ind. 477, 19 N. E. 327.

Louisiana.—State v. Williams, 7 Rob. (La.) 252, 266.

Missouri.—Williams v. State, 4 Mo. 480.

**Pennsylvania.**—Commonwealth v. Naylor, 34 Pa. St. 86.

South Carolina.—State v. Meyer, 1 Spear, 305; State v. Helgen, 1 Spear, 310.

Tennessee.—State v. Waze, 6 Humph. 17.

**England.**—Rex v. Mallaud, 2 Strange, 828.

See 3 Block. Comm. 160, 161, 162.

18. Phillips v. State, 19 Tex. 158, per Wheeler, J.

Commonwealth v. Ranson, 183
 Mass. 491, 67 N. E. 605.

20. State v. Corwin, 4 Mo. 609.

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punishment of an offense which is also an offense against the State and indictable under the State laws it has been decided that the power of the State to indict for such offense is not taken away by the power delegated to the city, as the action by the latter is to be regarded in the nature of a civil suit which does not bar prosecution by the State.<sup>21</sup>

§ 16. Where offense punishable by fine and imprisonment. -An offense punishable by fine only and for the recovery of which a specific remedy, exclusive of indictment, is provided is distinguishable from an offense which is punishable by fine and imprisonment, in which latter case an indictment will generally lie.<sup>22</sup> So where a statute imposes a penalty and also provides that the offense shall be a misdemeanor, punishable by fine and imprisonment the offender is subject to indictment in like manner as he would have been had the offense been a misdemeanor at common law.<sup>23</sup> In this latter case it was said in this connection: "Where a statute creates a new offense by making that unlawful which was lawful before, and prescribes a particular penalty and mode of proceeding, that penalty alone can be enforced. The offense in such case is not indictable. But where the act was an offense at common law, a cumulative sanction may be imposed by statute, and in such case the common law punishment is not excluded,either or both may be enforced. \* \* \* In this case, although a specific penalty is imposed for a violation of these sections of the act, the Legislature have thought proper to declare that such violations shall also be deemed misdemeanors, and be punishable by fine and imprisonment. They stand upon the same footing as though they had been misdemeanors at common law, and the statute had then, in addition, imposed a penalty."24 So where an Act of Congress provides that imprisonment either may or must be a part of the punishment in addition to a fine, it is decided

**<sup>21.</sup>** Levy v. State, 6 Ind. 281. See State v. Plunkett, 18 N. J. L. 5.

<sup>22.</sup> State v. Carter, 48 Mo. 481.

<sup>23.</sup> People v. Stevens, 13 Wend. (N. Y.) 341.

**<sup>24.</sup>** Per SUTHERLAND, J. See, also, Lane v. Brown, 16 Wend. (N. Y.) 561; People v. Hislop, 77 N. Y. 331.

that no civil action will lie and that the only remedy is by indictment.<sup>25</sup> And in New Jersey it has been decided that the offense of keeping a bawdy house, which is a crime indictable at common law and punishable in that State by fine and imprisonment in the State prison, can only be prosecuted by indictment under the Constitution of that State and that a statute authorizing the prosecution of such offense by a city court without an indictment found by a grand jury is illegal.<sup>26</sup>

§ 17. Necessity of indictment—Summary proceedings—Misdemeanors.—A constitutional provision requiring an indictment or information does not apply to that class of offenses which are to be tried summarily and without the intervention of an impartial jury from the vicinage,<sup>27</sup> such as misdemeanors, which are not

25. United States v. Ebner, 25 Fed. Cas. No. 15020, 4 Biss. (U. S.) 117.

26. State v. Anderson, 40 N. J. L. 224.

27. State v. Guitenez, 15 La. Ann. 190; State v. Glenn, 54 Md. 572.

What is meant by summary proceeding.—In 4 Blacks. Com. 280, Mr. Justice Blackstone says: "By a summary proceeding I mean principally such as is directed by several acts of Parliament (for the common law is a stranger to it, unless in the case of contempt), for the conviction offenders and the inflicting of certain penalties created by these Acts of Parliament. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge. An institution designed professedly for the greater ease of the subject, by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendance to try every minute offense." And again, in 4 Blacks. Com. 281, he says: other branch of summary proceedings is that before justices of the peace, in order to inflict diverse petty pecuniary mulcts, and corporal penalties denounced by Acts of Parliament for many disorderly offenses; such as common swearing, drunkenness, vagrancy, idleness and a vast variety of others for which I must refer the student to the justice-books formerly cited, and which used to be formally punished by the verdict of a jury in the court itself." Quoted in State v. Glenn, 54 Md. 572, 601.

For contempt of court in assaulting an attorney for the commonwealth, the court may proceed in a summary way, such right being fully established by the rule of the common law and an indictment is not required by a statute making such an offense a crime. Arnol v. Commonwealth, 80 Ky. 300.

embraced by the words "indictable offenses," <sup>28</sup> and are not capital or infamous crimes within the meaning of the fifth amendment to the United States Constitution. <sup>29</sup> So it has been determined in Georgia that there is nothing in the Constitution of the State or of the United States which guarantees to a person charged with a misdemeanor the right to demand an indictment by the grand jury. <sup>30</sup> And a constitutional provision as to indictment applies to offenses indictable at common law and does not require an indictment for misdemeanors created by statute for which no infamous punishment is provided. These may be tried in such manner as the Legislature may provide. <sup>31</sup>

28. State v. Berlin, 42 Mo. 572; State v. Ebert, 40 Mo. 186.

29. Territory of Montana v. Farnsworth, 5 Mont. 303, 5 Pac. 869. See State v. Craig, 80 Me. 85, holding that offenses not capital or infamous do not require indictment therefor and that prosecution may as well be instituted before a magistrate as by indictment.

**30.** Green v. State, 119 Ga. 120, 45 S. E. 990; Daughtry v. State, 115 Ga. 819, 42 S. E. 248.

31. Lowry v. Commonwealth, 18 Ky. Law Rep. 481, 36 S. W. 1117, citing Commonwealth v. Avery, 14 Bush (Ky.), 625; Williamson v. Commonwealth, 4 B. Mon. (Ky.) 146.

See, also, Alaska.—United States v. Powers, I Alaska 180, holding that misdemeanors may be prosecuted by information in Alaska.

Arkansas.—Rector v. State, 6 Ark. 187, holding that indictment is not necessary in case of misdemeanors and that the Legislature may provide for the prosecution of offenses less than felony at common law.

Colorado.—Re Constitutionality of House Bill No. 158, 21 Pac. 472, holding that the provision of the Colorado Constitution (art. 2, § 8), requiring that felonies be prosecuted by indictment is not violated by the prosecution of misdemeanors before justices of the peace upon a sworn complaint or other information. Chase v. People, 2 Colo. 509, holding that the Legislature may provide for the prosecution of misdemeanors by information.

District of Columbia.—In re George Fry, 3 Mackey, 135, holding that offenses not infamous may be prosecuted by information without violating the Federal Constitution and that offenses punishable only by imprisonment in the jail of the District of Columbia, such as petit larceny and the receiving of stolen goods amounting to less than \$35 in value are to be treated as non-infamous offenses.

Florida.—Ex parte Bell, 19 Fla. 608, holding that the Legislature may provide for prosecution of petty crimes without indictment. King v. State, 17 Fla. 183.

Georgia.—Welborne v. Donaldson, 115 Ga. 563, 41 S. E. 99, holding that the Legislature may provide for the punishment of misdemeanors without

§ 18. Same subject continued.—A' statute declaring that assaults are not indictable but may be prosecuted in a summary way before justices of the peace is not unconstitutional as being in violation of a provision in the Constitution that a person shall not be deprived of life, liberty or property but by the judgment of his peers or the law of the land.<sup>32</sup> And an act of the Legislature providing that misdemeanors may be prosecuted before justices of the peace upon sworn complaint or other information is not in violation of a constitutional provision that "Until otherwise provided by law, no person shall for a felony be proceeded against criminally, otherwise than by indictment, except in cases arising in the land and naval forces, or in the militia when in actual service in time of war or public danger. In all other cases offenses shall be prosecuted criminally, by indictment or information."33 Louisiana it has been decided that a violation of a city ordinance may be tried and punished summarily without an indictment or information.<sup>34</sup> In some States, under the provisions of the statutes

indictment. Turner v. State, 114 Ga. 421, 40 S. E. 308; Gordon v. State, 102 Ga. 673, 29 S. E. 444, holding that the Constitution of Georgia does not guarantee indictment in misdemeanor cases.

Indiana.—Webber v. Harding, 155 Ind. 408, 58 N. E. 533, construing Ind. St., Burns, 1894, § 1694, and holding that in Indiana in a criminal prosecution before a justice of the peace or a police judge it is not necessary that the charge be made by indictment or information, but may be by complaint under the statute.

Texas.—See Garza v. State, 11 Tex. App. 410, holding that in the absence of any provision in the Constitution or laws of the State authorizing the prosecution of misdemeanors other than by indictment or information, such offenses must be prosecuted in one of these two modes.

See Reddick v. State, 4 Tex. App. 32; Deou v. State, 3 Tex. App. 435.

Vermont.—State v. Dyer, 67 Vt. 690, 32 Atl. 814, holding that misdemeanors may be prosecuted by information.

Compare State v. Stein, 2 Mo. 667, wherein it was decided that a statute giving justices of the peace jurisdiction of breaches of the peace and providing that the accused might be tried and convicted without a previous indictment of the grand jury was repugnant to the Constitution of the United States and of the State.

32. State v. Ledford, 3 Mo. 75.

**33.** In re Constitutionality of House Bill No. 158 (Colo. 1886), 21 Pac. 472, construing § 8, art. 2, of Colo. Constitution.

**34.** Monroe v. Hardy, 46 La. Ann. 1232, 15 So. 696.

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misdemeanors may be prosecuted either by indictment or by affidavit and information.35 So in Missouri it has been held that the general assembly has power under the Constitution of that State to enact that, for offenses of the grade of misdemeanors, persons may be proceeded against criminally either by indictment or information.<sup>36</sup> And it is said to be a general rule that all public misdemeanors, which may be prosecuted by indictment, may be prosecuted by information in behalf of the commonwealth, unless the prosecution be restrained by the statute to indictment.37 So in a case in Texas it is decided that the fact that a person violating the provisions of a statute is by such statute "guilty of a misdemeanor and subject to indictment" does not render such mode of prosecution exclusive where the offense is a misdemeanor within the jurisdiction of a certain court and the Constitution and statutes provide that prosecutions in that court may be commenced by information in writing.38 So it has been decided that although by the general law of the State persons charged with certain offenses of the grade of misdemeanors must be proceeded against criminally by indictment, yet the general assembly may grant to municipal corporations the power to ordain that persons charged with such offenses may be proceeded against criminally by information. The general State law and the municipal ordinance may have a concurrent operation.39

In Alabama the Constitution provides that in cases of misdemeanors "the general assembly may by law dispense with the grand jury, and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established.<sup>40</sup> Where, however, the punishment for a violation of municipal ordinances may exceed the limits of jurisdiction of justices of the peace as prescribed by the Constitution, such vio-

<sup>35.</sup> Douglass v. State, 72 Ind. 385.

<sup>36.</sup> State v. Cowan, 29 Mo. 330, citing State v. Ledford, 3 Mo. 75, as having settled the doctrine in this respect in that State.

<sup>37.</sup> Commonwealth v. Inhabitants of Waterborough, 5 Mass. 257; Haines v. State, 7 Tex. App. 30.

<sup>38.</sup> Haines v. State, 7 Tex. App. 30.

<sup>39.</sup> State v. Cowan, 29 Mo. 330.

**<sup>40.</sup>** Witt v. State, 130 Ala. 129, 30 So. 473; Ala. Const., § 9, art. 1; Frost v. State, 124 Ala. 71, 27 So. 550.

lations are criminal offenses, which must be prosecuted by presentment or indictment of a grand jury as provided by a constitutional provision to the effect that no person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury "except . . . in cases cognizable by justices of the peace."

§ 19. Same subject—In Federal courts.—An information may be filed in the national courts for misdemeanors committed against the laws of the United States.42 So where by act of Congress the exportation of goods to a foreign country in violation of the provisions of such act was declared to be a misdemeanor, it was held that the circuit court had jurisdiction of such offense and that the cause was rightfully prosecuted by information.43 So in this connection it was said by Judge Dillon in a case in which this question arose, "Criminal prosecutions for misdemeanors was a familiar mode of procedure in England, 'as ancient,' says Blackstone,44 'as the common law itself;' and was the only existing mode of prosecution, it seems, except by indictment or presentment of a grand jury. 45 It was a mode in daily and constant use in England at the time of the American Revolution, as well as in the American Colonies. This was well known when the fifth amendment of the Constitution was adopted, which provided only for the previous action of a grand jury in capital or otherwise infamous offenses. If it had been intended wholly to prohibit prosecution by information, language expressive of such intention would have been used. Congress has never enacted a code of criminal procedure, and the States have no power to prescribe either modes of proceeding, or rules of evidence in prosecutions for Federal offenses. In a general way the Federal courts

**<sup>41.</sup>** State v. West, 42 Minn. 147, 43 N. W. 845.

<sup>42.</sup> United States v. Waller, 28 Fed. Cas. No. 16634. 1 Sawy. 701; United States v. Ebert, 25 Fed. Cas. No. 15019, holding offenses arising under the internal revenue laws mis-

demeanors which might be prosecuted by information.

<sup>43.</sup> United States v. Mann, 26 Fed. Cas. No. 15717, 1 Gall. 3.

<sup>44. 4</sup> Comm. 309.

<sup>45. 4</sup> Comm. 308.

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must be governed in these respects by the common law with the modifications pointed out by the Supreme Court."46

- § 20. When indictment not proper remedy.—Where it is provided by the Constitution of a State that certain offenses less than felony shall be prosecuted on information without indictment or the intervention of a grand jury, an indictment and proceedings thereunder for the prosecution of an offense of the character described will be unauthorized and void and no punishment can properly be imposed on one so accused and prosecuted.<sup>47</sup> So though by common law an assault is an indictable offense, yet where by statute an exclusive jurisdiction of such an offense is given to justices of the peace, an indictment therefor will not lie,<sup>48</sup> and an offense not indictable at common law and created by statute is only punishable as statute directs and if it does not provide for indictment the offense is not indictable.<sup>49</sup>
- § 21. Right to prosecute by indictment after demurrer to information sustained.—Where a person is prosecuted by information, although the court sustains a demurrer to the information and orders another one to be filed, the defendant may nevertheless be indicted by the grand jury without an order of court submitting it to them.<sup>50</sup>
- **46.** United States v. Maxwell, 26 Fed. Cas. No. 15750, 3 Dill. 275.
- 47. Walters v. State, 5 Iowa, 507, construing § 11 of the Bill of Rights, which provided that "All offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath, without indictment or the intervention of a grand jury, saving to the defendant the right of appeal." This case was

followed in State v. Shawbeck, 7 Iowa, 322.

- 48. State v. Hailstock, 2 Blackf. (Ind.) 257; Guy v. State, 1 Kan. 448.
- **49.** United States v. Willis, 28 Fed. Cas. No. 16728, 1 Cranch C. C. 511.
- 50. People v. Prather, 134 Cal. 436, 66 Pac. 589, 863; People v. Whelan, 117 Cal. 559, 49 Pac. 583. The court said in the latter case: "It was within the jurisdiction of the grand jury to take cognizance of the charge without an order of court sub-

§ 22. Power to indict person confined as military prisoner.—Congress has power to make rules for the government and regulation of the land and naval forces and it has been decided that in the exercise of this power it may provide that a person, who has been dismissed from the service and punished and is held as a military prisoner under sentence, may still be subject to trial by court-martial for offenses committed during such confinement. And such a law is held not to be in violation of the Fifth Amendment to the Constitution of the United States providing that no person not in the land or military forces shall be prosecuted for a capital or otherwise infamous crime except on a presentment or indictment of a grand jury.<sup>51</sup>

§ 23. Jurisdiction of court dependent on indictment where case appealed.— Where jurisdiction is conferred upon a court to try criminal offenses only upon indictment or information, this has reference only to the original jurisdiction of that court, and where it also has jurisdiction of criminal cases on appeal from a lower court, the former provision as to jurisdiction does not secure to the accused a right to be tried on information or indictment.

So in Florida where an appeal is taken to the Circuit Court from the judgment of a justice of the peace an information or indictment is unnecessary, but a trial de novo is had upon the affidavit, warrant and proceedings of the justice court which are returned to the Circuit Court in accordance with the provisions of the statute.<sup>52</sup> And in a case in North Carolina it is held that where a justice of the peace has jurisdiction of an offense it is not necessary on the trial of an appeal from a judgment rendered by a justice of the peace that an indictment should be found.<sup>53</sup>

mitting it to them. No such order was required, as the charge had not previously been examined by that or any former grand jury; and a demurrer having been sustained to the information, with a direction that a new one be filed, the status of the charge was, in all material respects, the same as though no information

had ever been filed." Per VAN FLEET, J.

51. Ex parte Wildman, 29 Fed. Cas. No. 17653a.

**52.** Ex parte Benjamin F. Morris, 45 Fla. 157, 34 So. 89; §§ 2981, 2982, Fla. Rev. St.

53. State v. Quick, 72 N. C. 241.

## § 24 RIGHT TO AND NECESSITY OF INDICTMENT.

§ 24. Indictments presenting questions in moot form.— In a case in West Virginia it has been decided that where indictments are drawn for the purpose of presenting to the court the questions involved in a moot form they will not be taken into consideration by the court which will not hear and determine moot questions, that is to say, abstract questions upon formal issues made up by the mutual consent and agreement of the counsel of the opposing contestants.<sup>54</sup>

**54.** State v. Peel Splint Coal Co.. 36 W. Va. 802, 809, 15 S. E. 1000, 17 L. R. A. 385.

#### CHAPTER III.

#### CONSTITUTIONAL AND STATUTORY PROVISIONS.

- Section 25. Terms "law of the land" and "due process of law" construed.
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#### § 25 CONSTITUTIONAL AND STATUTORY PROVISIONS.

- Section 45. Legislature may prescribe form of indictment; general rule.
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  - 55. Constitutional provision requiring indictment for offenses punishable with imprisonment for life construed.
  - 56. Right of State to provide for prosecution by information as affected by treaty.
  - 57. Code provision as to indictment against accessory and principal; constitutionality of.
- § 25. Terms "law of the land" and "due process of law" construed.—A frequent, if not general, provision of the American Constitutions is to the effect that a person shall not be deprived of his life, liberty or estate but by the judgment of his peers or the law of the land. This provision, the origin of which is to be found in the Magna Charta, has ordinarily been construed as giving to an accused person the right of prosecution according to the due course of the law, including trial by jury and prosecution by indictment for all the higher crimes and offenses, in the absence of a constitutional provision permitting prosecution by some other mode. The phrases "the law of the land" and "due process of law," as used in our various State Constitutions, are synonymous, and mean the law in its regular course of administration
- 1. Jones v. Robbins, 8 Gray Jones v. Robbins, 8 Gray (Mass.), (Mass.), 329; State v. Ray, 63 N. H. 329; Taylor v. Porter, 4 Hill (N. Y.), 406, 39 L. R. A. 432.
  - 2. Saco v. Wentworth, 37 Me. 172;

through the courts of justice.3 In this connection it is said in a case in Massachusetts: "Lord Coke, in commenting upon this clause of Magna Charta-nisi per legem terraeadopts the construction that the clause meant 'without process of law, that is, by indictment or presentment of good and This may not be conclusive; but, being lawful men.'4 a construction adopted by a writer of high authority, before the emigration of our ancestors, it has a tendency to show how it was then understood. Chancellor Kent, after setting forth the right and liberties claimed by the people of this country, and in explanation of these words from Magna Charta, says: 'The words by the law of the land, as originally used in Magna Charta in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men,' and he relies on the authority of Lord Coke for the correctness of this exposition."5

§ 26. "Due process of law" does not require preservation of grand jury and indictment.—Due process of law does not require the preservation and perpetuation of the grand jury system, and its abolishment is not an infraction of the sacred and inestimable rights, privileges and immunities to which every citizen of the State or of the United States is entitled as of right. So in a case in the United States Supreme Court it is decided that the words "due process of law," as used in the Fourteenth Amendment to the United States Constitution, do not require that a State in the prosecution of a murder must proceed by indicment. The court said in this case: "The objection that the proceeding by information does not amount to due process of

<sup>3.</sup> State v. Stimpson, 78 Vt. 124, 62 Atl. 14, 1 L. R. A. (U. S.) 1153. See, also, State v. Beswick, 13 R. I. 211, 218, 43 Am. Rep. 26.

<sup>4. 2</sup> Inst. 50.

<sup>5. 2</sup> Kent Com. (6th ed.) 13, cited in Jones v. Robbins, 8 Gray (Mass.), 329, 343, per Shaw, C. J.

<sup>6.</sup> State v. Tucker, 36 Oreg. 291,

<sup>295, 61</sup> Pac. 894, 51 L. R. A. 246. See, also, In re Dolph, 17 Colo. 35, 28 Pac. 470.

<sup>7.</sup> Maxwell v. Dow, 176 U. S. 581, 20 S. Ct. 448, 494, 44 L. Ed. 597, affirming Hurtado v. California, 110 U. S. 516, and cases following that decision.

## § 27 CONSTITUTIONAL AND STATUTORY PROVISIONS.

law has been heretofore overruled and must be regarded as settled by the case of Hurtado v. California.8 The case has since been frequently approved."9 And in a case in Colorado it is said in this connection: "No State shall deprive any person of life, liberty or property without due process of law, says the Constitution of the United States, and our own Constitution contains a like declaration. Due process of law, within the meaning of these constitutional provisions, undoubtedly includes 'law in its regular course of administration through courts of justice;' it also implies that any individual whose life, liberty or property may be affected by any judicial proceeding shall have timely notice thereof and reasonable opportunity to be heard in defense of his rights; but it does not necessarily include an indictment by a grand jury for a felony, even though such prosecution may deprive the accused of his life or liberty. While ancient forms of procedure are not to be lightly set aside or disregarded, modern judicial utterances as well as modern constitutions and laws evince more regard for substance than for form."10 So "due process of law" does not prevent the Legislature, when creating a city court, from providing for the trial of misdemeanor cases therein upon a mere accusation preferred and signed officially by the prosecuting officer of such court.11

§ 27. "Law of the land"—Has reference to time offense committed and not time of trial.—In determining the rights of an accused person under the phrase "the law of the land" the question arises whether such phrase has reference to the law in force at the time the offense was committed or at the time of the prosecution or trial. To be in accord with the construction given to constitutional provisions securing rights to individuals it would

Brown v. New Jersey, 175 U. S. 172, 176, 20 S. Ct. 77; Bolln v. Nebraska, 176 U. S. 83, 20 S. Ct. 287.

In re Dolph, 17 Colo. 35, 37,
 Pac. 470, per Elliott, J.

11. Wright v. Davis, 120 Ga. 679, 48 S. E. 170.

<sup>8. 110</sup> U.S. 516.

<sup>9.</sup> Per Mr. Justice PECKHAM, citing Hallinger v. Davis, 146 U. S. 314, 322, 13 S. Ct. 105; McNulty v. California, 149 U. S. 645, 13 S. Ct. 959; Hodgson v. Vermont, 168 U. S. 262, 272, 18 S. Ct. 80; Holden v. Hardy, 169 U. S. 366, 384, 18 S. Ct. 383;

seem that this phrase should be construed as referring to the law of the land at the time the offense was committed and that the rights given by the Constitution at that time would be the rights secured to him and of which he could not be deprived. this connection it is said in a case in which the phrase "the law of the land" is considered: "These terms, in this connection, cannot, we think, be used in their most bold and literal sense to mean the law of the land at the time of the trial; because the laws may be shaped and altered by the Legislature, from time to time; and such a provision intended to prohibit the making of any law impairing the ancient rights and liberties of the subject, would under such a construction be wholly nugatory and void. The Legislature might simply change the law, by statute, and thus remove the landmark and barrier intended to be set up by this provision in the Bill of Rights. It must therefore have intended the ancient established law and course of legal proceedings, by an adherence to which our ancestors in England, before the settlement of this country and the emigrants themselves and their descendants, had found safety for their personal rights."12

§ 28. What are "infamous crimes" within constitutional provision.—The question as to what constitutes an "infamous crime," within the meaning of the fifth amendment of the United States Constitution and also within the meaning of similar provisions in the State Constitutions has been prolific of much discussion and there are numerous decisions in the earlier cases in the Federal courts which are not consistent with the modern doctrine.<sup>13</sup> The theory upon which the courts proceeded in the

12. Jones v. Robbins, 8 Gray (Mass.), 329, 343, per Shaw, C. J.

13. Embezzlement by a postmaster is not an infamous crime. United States v. Reilley, 20 Fed. 46. Passing a counterfeited obligation of an interest-bearing coupon bond of the United States is not an infamous crime; may be prosecuted by information. In re Wilson, 18 Fed. 33. Passing

counterfeit money of the United States is not an infamous crime. United States v. Field, 16 Fed. 778. Conspiring to make counterfeit coin not an infamous crime, etc. United States v. Burgess, 9 Fed. 896. Stealing from the mail not an infamous crime. United States v. Wynn, 9 Fed. 886. Passing counterfeit trade dollars of United States not an infam-

## § 29 Constitutional and Statutory Provisions.

earlier cases in reaching their conclusions was that it was not the question of degree of punishment which controlled, but rather the nature or character of the crime.14 The United States Supreme Court, however, in Ex parte Wilson, 15 determined that any crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the fifth amendment of the United States Constitution and could not be prosecuted by information in any court of the United States. 18 And in a later case in this court it was determined that it is not necessary to render a crime an infamous one within the meaning of the fifth amendment of the United States Constitution, providing that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," that the crime shall be punishable with hard labor, but if the crime is punishable by imprisonment in a State prison or penitentiary it is an infamous crime, whether with or without hard labor.<sup>17</sup> "The test is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one; when the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury." 18

§ 29. What are infamous crimes within constitutional provision—Continued.—As we have already stated, 19 the doctrine prevailed to a great extent at one time that this question was to be

ous crime. United States v. Yates, 6 Fed. 861. Embezzlement of a letter by an employee in the postal service is not an infamous crime. United States v. Baugh, 1 Fed. 784.

14. See Butler v. Wentworth, 84 Me. 25, 24 Atl. 456, and also cases in preceding note.

15. 114 U. S. 417, 5 S. Ct. 935.

16. See, also, United States v. Petit, 114 U. S. 429, 5 S. Ct. 1190;

United States v. Wong Dep Ken, 57 Fed. 206.

17. United States v. DeWalt, 128 U. S. 393, 32 L. Ed. 485, 9 Sup. Ct. R. 111; Mackin v. United States, 117 U. S. 348, 6 S. Ct. 777.

18. Mackin v. United States, 117 U. S. 348, 6 S. Ct. 777, per Mr. Justice Gray.

19. See preceding section.

determined rather by the nature of the crime than by the punishment which might be inflicted. In reference to this doctrine it is said in a case in Maine: "If the nature of the crime as understood at common law, rather than the punishment inflicted, were to govern in determining whether it was infamous or not within the meaning of the provision of the Constitution, many offenses might be held not to be infamous crimes and requiring no indictment for their prosecution. This doctrine at one time obtained considerable foothold in the Federal courts. Thus the offense of stealing or embezzling from the mails,20 passing counterfeit money,21 embezzlement as defined by the Federal statutes,22 wilfully and fraudulently omitting assets of a bankrupt from the inventory of his estate,23 were held not to be infamous crimes, and that no indictment was necessary for their prosecution. But this doctrine has since been expressly disapproved by the Supreme Court of the United States, where it has been decided that any crime which is punishable by imprisonment for a term of years is an infamous crime, and cannot be prosecuted except upon indictment or presentment by a grand jury; thus repudiating the doctrine enunciated in some of the earlier decisions not only of the State, but also of the Federal courts, that the question whether the crime is infamous is to be determined solely and entirely from the nature of the act and in total disregard of the punishment inflicted.24 And the purport of all the decisions from the highest court in this country since Ex parte Wilson, supra,25 is that a crime punishable by imprisonment in the State prison or penitentiary, whether the accused is or is not sentenced to hard labor,

<sup>20.</sup> United States v. Wynn, 9 Fed. 886.

<sup>21.</sup> United States v. Yates, 6 Fed. 861.

<sup>22.</sup> United States v. Reilley, 20 Fed. 46.

<sup>23.</sup> United States v. Black, 4 Sawy. C. C. 211.

**<sup>24.</sup>** Ex parte Wilson, 114 U. S. 417, 5 S. Ct. 935; Mackin v. United States, 117 U. S. 348, 6 S. Ct. 977;

Parkinson v. United States, 121 U. S. 281, 7 S. Ct. 896; Ex parte Bain, 121 U. S. 1, 13, 7 S. Ct. 781; United States v. DeWalt, 128 U. S. 393, 9 S. ct. 111; Medley, Petitioner, 134 U. S. 160, 169, 10 S. Ct. 491; In re Mills, 135 U. S. 263, 267, 10 S. Ct. 762; In re Claasen, 140 U. S. 200, 205, 11 S. Ct. 735; Jones v. Robbins, 8 Gray, 329.

<sup>25. 114</sup> U. S. 417, 5 S. Ct. 935.

is an infamous crime; and in determining this, the question is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment actually imposed is an infamous one."<sup>26</sup>

§ 30. What are infamous crimes within constitutional provision—Conclusion.—The modern rule as to whether a crime is an "infamous crime" within the meaning of a constitutional provision requiring an indictment in such cases, is that the question is to be determined by the nature of the punishment which may be inflicted. If the accused may be subjected to an infamous punishment, the fact that the punishment may on the other hand be lighter does not change the character of the offense. And it has been generally decided that a crime, punishable by imprisonment in a State prison or penitentiary, whether with or without hard labor, is an infamous crime which must be prosecuted by indictment, in the absence of some controlling constitutional or statutory provision which permits of the prosecution of such offenses by some other mode of procedure.<sup>27</sup> The words

26. Butler v. Wentworth, 84 Me. 25, 24 Atl. 456, per FOSTER, J.

27. See cases cited in two preceding sections.

See, also, United States v. Cobb, 43 Fed. 570; United States v. Smith, 40 Fed. 755; Ex parte McClusky, 40 Fed. 71; United States v. Johannesen, 38 Fed. 411; Territory of Arizona v. Blomberg, 2 Ariz. 204, 11 Pac. 671; King v. State, 17 Fla. 183; State v. Reeves, 97 Mo. 668, 10 S. W. 841.

In Connecticut, under a constitutional provision which requires that all crimes punishable by death or life imprisonment shall be prosecuted by indictment and a statutory provision that all crimes not so punishable may be prosecuted by information, it is decided that where the punishment for a crime is not less than ten years and no maximum penalty is stated, the crime may be prosecuted by information. Romero v. State, 60 Conn. 92, 22 Atl. 496.

To make a punishment for a crime infamous it must pronounce against the offender a degradation from his civil rights as a citizen, the right of franchise, the right of giving testimony, or some other civil or political right, and in the absence of such forfeiture the crime will not be deemed legally infamous unless it is so expressly pronounced. United States v. Cross, 1 McArthur (D. C.), 149, 153, per Carttee, J.

Embezzlement and making of false entries by a national bank president is an infamous crime. United States v. DeWalt, 128 U. S. 393, 32 L. Ed. 485, 9 S. Ct. 111. "infamous crime" do not, however, include every offense which is punishable by imprisonment, as in the case of petty crimes and misdemeanors.28 So an offense punishable by imprisonment in jail not exceeding a year without hard labor has been held not an infamous crime, and may be prosecuted by information,29 And it is also held, under a statute permitting the attorney general in the case of the conviction of a person where the punishment is confinement for less than a year in jail, to send the person convicted in another State to be imprisoned, where there is no jail in the district or State where he was convicted, in which he could be confined, that the mere fact of the attorney general engaging prisons in another State than that in which the convict is sentenced cannot change the character of the convict's punishment nor make that infamous which was not so by the sentence.30 Again, where different punishments are inflicted for different degrees of an offense and the offense is usually charged in the same terms whatever the punishment may be, it has been decided that the degree of the offense in any particular case must depend upon the proof adduced and not upon the facts alleged.31

§ 31. Constitutional right to indictment cannot be waived—United States Constitution.—The fifth amendment to the United States Constitution, providing that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury," was manifestly designed and intended for the security of personal rights.<sup>32</sup> It is an essential to the jurisdiction of the court <sup>33</sup> and being a

Misapplying the funds of a national bank is an infamous crime. United States v. Hade, 26 Fed. Cas. No. 15274.

Assault with intent to kill is an infamous crime. Ex parte Brown, 40 Fed. 81.

Larceny is an infamous crime. United States v. Fuller, 3 N. M. 367.

28. State v. Nolan, 15 R. I. 529,

10 Atl. 481.

29. United States v. Cobb, 43 Fed. 570.

30. United States v. Cobb, 43 Fed. 570.

31. State v. Cram, 84 Me. 271, 24 Atl. 853.

32. Ex parte Bain, 121 U. S. 1, 6, 7 S. Ct. 781.

33. Ex parte Bain, 121 U. S. 1, 7

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constitutional right of a party cannot be waived by him so as to preclude him from subsequently setting up want of jurisdiction in the court to try him. "A party cannot waive a constitutional right when its effect is to give a court jurisdiction.34 fifth amendment to the Constitution, that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, provides for a \* \* \* If the crime be of such requisite to jurisdiction. a nature that an indictment to warrant a prosecution of the crime is required by the law, the court has no jurisdiction to try without such indictment. Can a party consent to jurisdiction? Can he by agreement with the government, surrender his liberty for a stipulated time? Has any person a right to surrender his liberty in violation of a fundamental right, secured to him for the protection of such person by the fifth amendment to the Constitution of the United States? No man or no power has the right to take away another's liberty, even though with consent, except by due process of law. Due process of law, in a case like the one charged against petitioners, means compliance by the government with a fundamental requisite, such as that the party shall be charged with the crime in the way provided by the Constitution and laws of the United States."35

§ 32. Constitutional right to indictment can not be waived—Under State Constitutions.—Where by a State constitutional provision the right is secured to a person accused of certain crimes of an indictment by the grand jury, a proceeding against him in the manner specified is essential to confer jurisdiction upon the court, and jurisdiction in such a case cannot be acquired, by any act of consent or waiver on the part of an accused person, to try or to convict him of a crime of the character specified where he has not been proceeded against therefor by indictment.<sup>36</sup> Where by constitutional provision the right is given to a person

S. Ct. 781; Ex parte McClusky, 40 Fed. 71, 74.

**<sup>34.</sup>** Citing Hawes Jur., §§ 11, I2.

<sup>35.</sup> Ex parte McClusky, 40 Fed.

<sup>71, 74,</sup> per PARKER, J.

**<sup>36.</sup>** People v. Granice, 50 Cal. 447; State v. Queen, 91 N. C. 659; Rice v. State, 3 Heisk (Tenn.), 215.

"to demand the nature and cause of the accusation against him," such right cannot be waived or surrendered by him, and if an indictment is void by reason of the fact that it does not contain such a description of the offense as to notify the accused of the "nature and cause of the accusation against him" an objection thereto may be made at any time.<sup>37</sup> And where a person charged with the crime of burglary with intent to commit murder, consented to a mistrial and pleaded "guilty of larceny" and was sentenced to imprisonment in the penitentiary it was held that his confession of being guilty of a crime, warranted no judgment against him.38 And it was here said: "The section of the Bill of Rights declares that 'no person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment or impeachment.' And there is no other mode provided in the Constitution for the prosecution of felonies. judgment pronounced by His Honor was in contravention of this provision of the Constitution, and was therefore without authority and void."39 So where there has been no presentment of a grand jury or bill of indictment, the fact that a person confesses in court to being guilty of a crime which requires an indictment or presentment, confers no power upon the court to sentence him to imprisonment, and he can only be lawfully sentenced after he has been proceeded against in the manner provided in the Constitution.40 Again, where the Constitution of a State specifies the manner in which an indictment shall conclude, a compliance therewith is essential to the validity of the indictment and the rights which an accused person has in this respect cannot be waived by him. Thus it has been so held where the Constitution provides that an indictment shall conclude "against the peace and dignity of the State," it being declared that: "An indictment without these words is not an accusation of crime, and not an indictment in the

37. Newcomb v. State, 37 Miss. 383; People v. Campbell, 4 Park. Cr. R. (N. Y.) 386, wherein it is said: "This court cannot acquire jurisdiction to try an offense by consent, nor can its jurisdiction over an offense be changed by consent so as to embrace

any other than that presented by the grand jury, where the action of that body is requisite." Per Russell, J.

<sup>38.</sup> State v. Queen, 91 N. C. 659.

**<sup>39.</sup>** Per Ashe, J.

**<sup>40.</sup>** State v. Queen, 91 N. C. 659, 661.

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sense of the Constitution. No conviction upon such an indictment could be permitted to stand; and a prisoner cannot waive his rights in this respect, as it is the imperative mandate of the Constitution, that all crimes shall be prosecuted by presentment or indictment, and that all indictments shall conclude 'against the peace and dignity of the State.' "41 But in a case in New Jersey it is declared that the provisions of the Constitution, that "no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury," and that "in all criminal prosecutions the accused shall have a right to a speedy public trial by an impartial jury" are placed in the Constitutions under the head of "Rights and Privileges," and are classified with other rights and privileges enumerated in the Constitution. And it is decided that these provisions are for the benefit of the accused and are subject to that fundamental rule of law that a person may renounce a provision made for his benefit, and to that maxim, Quilibet protest renunciare juri pro se introducto which applies as well to constitutional law as to any other. And the court further held in this case that the constitutional rights of an accused, are not infringed where two modes of preferring a criminal accusation and two modes of trial are provided by law—one by indictment and trial by jury, the other by a written accusation and trial by the court—and the option is given to the accused to have the accusation submitted to a grand jury, with trial by jury, in case an indictment be found, or to submit to a trial on a written accusation, and by the court without a jury.42

§ 33. Waiver of right to indictment by failure to demand—Misdemeanors—Statute.—It may be provided by statute that a person who is accused of a misdemeanor must, in order to avail himself of a right to demand an indictment, make such a demand in "a writing signed by him." And where in the prosecution

<sup>41.</sup> Rice v. State, 3 Heisk. (Tenn.) 215, per SNEED, J.

**<sup>42.</sup>** Edwards v. State, 45 N. J. L. 419.

<sup>43.</sup> Shivers v. State, 123 Ga. 538,

<sup>51</sup> S. E. 596, holding that under the Ga. Rev. Code, § 751, which so provides, an oral demand made by counsel is not sufficient.

of a person for a misdemeanor the accused person after being fully informed of his rights waives the right to demand his prosecution by indictment, such waiver cannot be subsequently withdrawn by him.<sup>44</sup>

- § 34. Congress can not take away right of indictment but may change grade of a crime.—Congress has no power to dispense with an indictment in the prosecution of those offenses which are infamous. It may, however, in the exercise of the powers conferred upon it change the grade of a crime from that of an infamous one to a misdemeanor, and thus dispense with the necessity of an indictment, where the Constitution does not designate the crime as infamous and is silent as to the punishment. has been said in a case in which this question is considered: power of Congress to reduce a pre-existing felony to the proportion of a misdemeanor exists unquestioned in all cases where the penalty is not fixed by the Constitution. It is, nevertheless, urged under the authority of the fifth amendment of the Constitution that Congress has not the power to dispense with indictment in the process of punishment in this offense, if the offense was infamous. This proposition involves a confusion of ideas. Congress clearly has not the power to dispense with a grand jury in the punishment of crimes made infamous. It is equally clear that they have the power to reduce a crime from the grade of infamy to misdemeanor in all cases where the Constitution does not prescribe the punishment, and pronounce the infamy."45
- § 35. State may dispense with indictment—Not restricted by fifth amendment to United States Constitution.—The fifth amendment to the United States Constitution, giving to one accused of a capital or otherwise infamous crime the right of presentment or indictment by the grand jury, does not restrict the
- **44.** Butler v. State, 97 Ga. 404, 23 S. E. 822; Brown v. State, 89 Ga. 340, 15 S. E. 462; Cunningham v. State, 80 Ga. 4, 5 S. E. 251; McConnell v.

State, 67 Ga. 633; Smith v. State, 63 Ga. 168.

45. United States v. Cross, 1 McArthur (D. C.), 149, 151, per CARTTER, J.

States in the prosecution of such crimes to the common law indictments.46 So it has been declared in a case in the United States Circuit Court that: "The Constitution of the United States was not intended to deprive the states of the power to provide for the trial

46. Noles v. State, 24 Ala. 672, wherein it is declared that these provisions were demanded by the States, as safeguards against encroachments on the part of the Federal govern-The court said in this connecment. "The States, as independent tion: sovereignties, could certainly have protected their own citizens, by their fundamental laws, from the effects of improper legislation by their legislative assemblies; but as the citizens of all the States were to be amenable to the laws of the general government, when passed in conformity to the powers conferred by the Federal Constitution, over which laws the States, as such, possessed no power, it was deemed essential to the security of the citizens, and to the rights of the States, to place further restrictions upon the powers of the Federal government as the same is provided for in these amendments. are not left to reason and the history of the country alone to sustain our The authority of adjudged cases abundantly sanctions it. CHILTON, J., citing Jackson v. Wood, 2 Cow. 818, n. b.; Livingston v. The Mayor of New York, 8 Wend. 100; Barron v. The Mayor and City Council of Baltimore, 7 Peters. Rep. 247.

The words of Mr. Chief Justice Marshall are of value in this connection. Ιt was said by him: " The Constitution ordained was and established by the people of the United States for themselves.

for their own government and not for the government of the individual Each State established a States. Constitution for itself, and, in that Constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instru-They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the States. In their several Constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest." Barron v. Mayor and City Council of Baltimore, 7 Pet. (U.S.) 243, 247.

and punishment of criminal offenses committed in violation of their laws. These articles of amendment have reference to the powers exercised by the government of the United States and not to those of the States. The first eight articles of amendment are limitations on the powers exercised by the general government, and not exercised by the States." <sup>47</sup>

§ 36. State may dispense with indictment - Not restricted by fourteenth amendment to United States Constitution. -It is decided by the United States Supreme Court that an indictment by a grand jury is not essential to that "due process of law," when applied to prosecutions for felonies, which is secured by this provision of the Constitution of the United States, and which accordingly it is forbidden by the States respectively to dispense with in the administration of the criminal law. In this case it was held that in a prosecution by the State of California for murder an indictment was not necessary and that, where the Constitution of the State provided for the prosecution of felonies by information, and one was convicted under such an information of murder in the first degree and sentenced to death, the conviction was not illegal as being in violation of the fourteenth amendment which prohibits the States from depriving any person of his life, liberty or property without due process of law.48 with this conclusion also is an early decision in California,49 and also in Wisconsin.50 In this latter case the court said, in speaking of the fourteenth amendment: "But its design was not to confine the States to a particular mode of procedure in judicial proceedings, and to prohibit them from prosecuting for felonies by information instead of by indictment, if they chose to abolish the grand jury system. And the words 'due process of law' in the amendment do not mean and have not the effect to limit the powers of State governments to prosecutions for crime by indictment; but these words do mean law in its regular course

**<sup>47.</sup>** Williams v. Hert, 110 Fed. 166, **49.** Kallock v. Superior Court, 56 168, per Baker, J. Cal. 229.

**<sup>48.</sup>** Hurtado v. California, 110 U. **50.** Rowan v. State, 30 Wis. 129 S. 516, 4 S. Ct. 111, 292.

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of administration, according to prescribed forms, and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change, from time to time, with the advancement of legal science and the progress of society; and, if the people of the State find it wise and expedient to abolish the grand jury and prosecute all crimes by information. there is nothing in our State Constitution and nothing in the Fourteenth Amendment to the Constitution of the United States which prevents them from doing so."51 So the court says in a case in Missouri, where this question is considered: "That it was entirely competent for the people of Missouri to provide that felonies might be prosecuted by information without infringing the Constitution, we entertain no doubt whatever. The fourth, fifth and sixth amendments to the Constitution of the United States are limitations only upon congressional power, and not upon the several States, and it has been expressly held by the Supreme Court of the United States, that a State Constitution authorizing prosecutions for felonies on information rather than by indictment was not a denial of due process of law within the meaning of the fourteenth amendment to the Constitution of the United States."52 So in a case in Colorado it is decided that the Legislature may provide for the prosecution of a felony by information instead of by indictment and a prosecution in this manner is due process of law within the meaning of both the State and Federal Constitutions. 52a The court in this case said: "Due process of law within the meaning of these constitutional provisions undoubtedly includes 'law in its regular course of administration through courts of justice;' it also implies that any individual whose life, liberty or property may be affected by any judicial proceeding shall have timely notice thereof, and reasonable opportunity to be heard in defense of his rights; but it does not necessarily include an indictment by a grand jury for a felony, even though such prosecu-

<sup>51.</sup> Per Cole, J.

**<sup>52.</sup>** State v. Jones, 168 Mo. 398, 402, 68 S. W. 566, per GANTT, J., citing Hurtado v. California, 110 U. S.

<sup>516, 4</sup> S. Ct. 111, 292; Hodgson v. Vermont, 168 U. S. 262, 18 S. Ct. 80.
52a. In re Dolph, 17 Colo. 35, 28 Pac. 470.

tion may deprive the accused of his life or liberty. While ancient forms of procedure are not to be lightly set aside or disregarded, modern judicial utterances as well as modern Constitutions and laws evince more regard for substance than for form."<sup>52b</sup>

§ 37. State may dispense with indictment—Not restricted by United States Constitution.—The generally accepted rule is that the United States Constitution and amendments thereto are in no way a restriction upon the power of the individual States to dispense with an indictment in cases of capital or otherwise infamous crimes, and that the provisions of the Constitution securing to a person so accused the right to an indictment and providing that no person shall be deprived of his life, liberty or property without due process of law are not violated by State legislation providing for the prosecution of such crimes by information.<sup>53</sup>

52b. Per Elliott, J.

53. United States.—Davis v. Burke, 179 U. S. 399, 21 S. Ct. 210, 45 L. Ed. 241; Bolln v. Nebraska, 176 U. S. 83, 20 S. Ct. 287, 44 L. Ed. 382; Hodgson v. Vermont, 168 U. S. 262, 18 S. Ct. 80, 42 L. Ed. 461; McNulty v. California, 149 U. S. 649, 13 S. Ct. 959, 37 L. Ed. 882; Vincent v. California, 149 U. S. 648, 13 S. Ct. 960, 37 L. Ed. 884; United States v. Petit, 114 U. S. 429, 5 S. Ct. 1190, 29 L. Ed. 93; Williams v. Hert, 110 Fed. 166; In re Humason, 46 Fed. 388.

Connecticut.—State v. Keena, 64 Conn. 212, 29 Atl. 470.

Iowa.—State v. Wells, 46 Iowa, 662.

**Kansas.**—State v. Barnett, 3 Kan. 250, 87 Am. Dec. 471.

**Kentucky.**—Jane v. Commonwealth, 3 Metc. (Ky.) 18.

Louisiana.—State v. Smith, 21 La. Ann. 574.

Missouri.-State v. Rudolph, 187

Mo. 67, 85 S. W. 584; State v. Jones, 168 Mo. 398, 68 S. W. 566.

Nebraska.—Hawkins v. State, 60 Neb. 380, 83 N. W. 198; Bolln v. State, 51 Neb. 581, 71 N. W. 444; State v. Miller, 43 Neb. 860, 62 N. W. 238; Mill v. State, 29 Neb. 437, 45 N. W. 451.

New York.—People v. Scannell, 37 Misc. R. 345, 75 N. Y. Supp. 500; Murphy v. People, 2 Cow. 815; Jackson v. Wood, 2 Cow. 819.

**Ohio.**—Prescott v. State, 19 Ohio St. 184, 2 Am. Rep. 388.

Ore. 250, 80 Pac. 103, 79 Pac. 577.

Texas.—Pitner v. State, 23 Tex. App. 366, 5 S. W. 210.

Utah.—In the matter of the application of C. L. Maxwell for a Writ of Habeas Corpus, 19 Utah, 495, 57 Pac. 412.

Vermont.—State v. Stimpson, 78 Vt. 124, 62 Atl. 14, I L. R. A. (N. S.) 1153; State v. Leach, 77 Vt. 166, 59 §§ 38, 39 Constitutional and Statutory Provisions.

§ 38. State may dispense with indictment — Not restricted by adoption of United States Constitution.—The fact that it is provided in the Constitution of a State that the United States Constitution is the Supreme law of the land does not operate to make the provisions of the latter instrument parts of the State Constitution,<sup>54</sup> so as to require an indictment or presentment by a grand jury for an offense within the jurisdiction of the State court.<sup>55</sup> So the fact that a State upon its admission into the Union adopts the Constitution of the United States as its fundamental law does not render a provision of the State Constitution permitting prosecution for felony by information unconstitutional as in violation of the fourteenth amendment to the United States Constitution.<sup>56</sup>

§ 39. Where indictment and information concurrent remedies—May proceed by information though grand jury in session.—Where by statute the two modes of procedure, indictment and information, are made concurrent remedies an information is not rendered invalid because at the time it was filed there was a grand jury of the county in session.<sup>57</sup> So in Louisiana it is decided that the prosecution of offenses not capital, may, under the Constitution and laws of that State, be prosecuted by indictment or information in the discretion of the district attorneys, and that such discretion cannot be affected by the fact that the grand jury may be in session. And it is also

Atl. 168; State v. Keyes, 8 Vt. 63, 30 Am. Dec. 450.

Washington.—State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; Lybarger v. State, 2 Wash. 552, 27 Pac. 449, rehearing denied in 2 Wash. 564, 27 Pac. 1029.

**Wisconsin.**—In re Ferdinand Bergin, 31 Wis. 383, citing and following Rowan v. State, 30 Wis. 129.

**54.** People v. Nolan, 144 Cal. 75, 77 Pac. 774.

**55.** In re Rafferty, 1 Wash. 382, 25 Pac. 465.

56. Bolln v. Nebraska, 176 U. S. 83, 20 S. Ct. 287, 44 L. Ed. 392. The court said: "We have repeatedly held the Fourteenth Amendment was not intended to curtail the powers of the States to so amend their laws as to make them conform to the wishes of their citizens, to changed views of administration, or to the exigencies of their social life." Per Mr. Justice Brown.

57. People v. Ebanks, 120 Cal. 626,52 Pac. 1078.

decided that such discretion is not subject to the control of the courts, though it is provided by statute that such offenses may be prosecuted "by information, with the consent of the court first obtained." <sup>58</sup>

§ 40. Powers of territorial government to dispense with indictment.—Residents under a territorial government are subject to, and entitled to the protection of, the laws of the United States and it has been determined that the amendments to the Federal Constitution securing to a person accused of a capital or otherwise infamous crime the right of prosecution by indictment applies to such persons.<sup>59</sup> So the provision of the United States Revised statutes that "The legislative power of every Territory shall extend to all rightful subjects of legislation (not inconsistent) with the Constitution and laws of the United States," 60 is held to be a limitation upon the legislative power of the territories and to be the organic law which must govern them. Under this provision and also the one providing that "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories," etc., "as elsewhere in the United States," and also the further provision that "The Congress shall have full power to dispose of and make all needful rules and regulations respecting the territories,"61 it has been decided that the fifth amendment to the United States Constitution applies to the territories and that a territorial act providing for the prosecution by information of any offense embraced in such amendment is in violation of the Constitution and void.62 But where the laws of a territory required that all public offenses with certain exceptions

58. State v. Cole, 38 La. Ann. 843. See State v. Woods, 31 La. Ann. 267, as to prosecution for offenses not capital by information. And see, also, State v. Newton, 30 La. Ann. 1253; State v. Anderson, 30 La. Ann. 557; State v. Maxwell, 28 La. Ann. 361.

State v. Kingsley, 10 Mont.
 7, 26 Pac. 1066; State v. Rock, 20

Utah, 38, 57 Pac. 532; McCarty v. State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. R. 152.

60. § 1851 U. S. Rev. St.

**61.** § 1891, U. S. Rev. St.; § 3, art. 4, U. S. Const.

62. Territory of Arizona v. Blomberg, 2 Ariz. 204, 11 Pac. 671.

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should be prosecuted by indictment it was decided that a prosecution for larceny which was not within the exceptions must be by indictment as this was an infamous under the laws of the territory and that the provision of the United States statutes<sup>63</sup> that all crimes and offenses against the provisions of a certain act,64 specifying offenses against the revenue, postal and marine law and by persons holding a fiduciary relation with the United States, including larceny, which were not infamous might be prosecuted either by indictment or information did not apply.65 And it has been decided that the constitutional and statutory provisions of the United States requiring an indictment by a grand jury do not apply to the prosecution of a Cherokee Indian for murder committed upon the person of another within the jurisdiction of the Cherokee nation, but that such offense is one against the local laws of the Cherokee nation, and to be prosecuted in accordance with the laws of that nation.66

§ 41. A constitutional provision as to indictment gives no vested right—California case.—In California it has been decided that a constitutional provision that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury is not to be construed as giving a vested right to prosecution on presentment or indictment, but rather has reference to a mode of procedure or remedy. In the case in which this doctrine was enunciated it was also decided, in line with the above conclusion, that though an offense was committed when such a provision as above was in force, yet if a constitutional provision was subsequently passed providing for prosecution of the offense by information, the accused could be proceeded against by information.<sup>67</sup> The court in this case quotes

67. People v. Campbell, 59 Cal. 243, 43 Am. Rep. 257. The constitutional provision in force when the offense was committed was as follows: "No person shall be held to answer for a capital or otherwise infamous crime . . . unless on present-

**<sup>63.</sup>** § 1022.

**<sup>64.</sup>** Ch. 7, Rev. St. U. S., title "Crimes."

<sup>65.</sup> Williams v. United States, 4 Ind. Terr. 204, 69 S. W. 849.

**<sup>66.</sup>** Talton v. Mayes, 163 U. S. **376**, 16 S. Ct. 986, 41 L. Ed. 196.

from Mr. Cooley in his work on Constitutional Limitations as follows: "But so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the Legislature, and it would create endless confusion in legal proceedings, if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure, though it cannot lawfully, we think, in so doing, dispense with any of these substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as doubtless would be any similar statute, and in its operation working no injustice to the defendant, and depriving him of no substantial right." 68 The court then said: "On principle and authority, we think, there can be no objection to the new remedy prescribed by the Constitution and act of the Legislature. It was competent to introduce the prosecution by information and to make the same applicable to past offenses, as it was to establish a new forum in which prosecutions for past offenses should take place." 69

The court also considered the question whether it was intended to make the provisions applicable only to future offenses, and said in this connection: "Neither the Constitution nor the Act of

ment or indictment of a grand jury." By the Constitution which went into effect after the commission of the crime it was provided that "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination or commitment by a magistrate, or by indictment with or without such examination and commitment, as may be presented by law." In pursuance

of this latter provision an act was passed by the Legislature providing that "All public offenses triable in the Superior Court shall be prosecuted by indictment or information, except as provided in the next section."

Cooley on Constitutional Limitations, p. 331.

69. Per Morbison, J.

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the Legislature, expressly or by legal inference, refers to future offenses only, but the terms of the Constitution, as well as the Act of the Legislature, by their natural import and signification, apply to all prosecutions thereafter to take place, without reference to the time when the act was committed. We can see no good reason why an act previously committed must be prosecuted by indictment, and one subsequently committed may be prosecuted by indictment or information, and, in our opinion, there is nothing in the provisions referred to which would justify such a construction. We are, therefore, of opinion that the case is one in which an information was a proper mode of prosecution." <sup>70</sup>

§ 42. A constitutional provision as to indictment gives no vested right-Missouri case.-It has been decided in Missouri that an amendment to the Constitution making indictment and information concurrent remedies will authorize the prosecution by information of a felony which was committed before the amendment went into effect, and it is not as to such offense to be considered as an ex post facto law, but rather as simply providing for a change in the mode of procedure. The court in this case referred to the definition of an ex post facto law which we note herein, and said: "Under this definition of an ex post facto law, the amendment, although providing for another mode of procedure for the prosecution of felonies than by indictment does not fall within the meaning of an ex post facto law as thus defined, for it does not make an action done before its adoption criminal, nor does it aggravate the crime or in any way affect it, nor change the punishment nor alter the rule of evidence, but, as has been said, goes merely to the mode of procedure. of investigating the facts remains as before, and this through a trial by jury of defendant's own choosing, surrounded by certain safeguards guaranteed to him by the laws of the land which cannot be dispensed with." 71

70. Per Morbison, J.71. State v. Kyle, 166 Mo. 287,

71. State v. Kyle, 166 Mo. 287, 305, 65 S. W. 763, 56 L. R. A. 115, per Burgess, J., quoting as follows

from Calder v. Bull, 3 Dall. (U. S.) 386, as to what are ex post facto laws; ex post facto laws are said to be: "First. Every law

§ 43. Whether a constitutional provision as to indictment gives vested right—Conclusion.—The cases cited in the two preceding sections 72 are authority for the proposition that though the right to prosecution by indictment is given to an accused person by the constitution of the State, yet though a crime requiring indictment may be committed while such provision is in force, yet, if the Constitution is subsequently amended so as to permit of the prosecution of such a crime by information, the amendment will apply in that case and the accused person may be prosecuted by information, it being declared that the original provision of the Constitution gave no vested right to prosecution by indictment, but merely prescribed a mode of procedure and that the amendment is not as to such offense an ex post facto law. It is rather difficult to harmonize these cases with the generally accepted rule as to the power of the Legislature to prescribe the form of an indictment, it being generally held that the Legislature has the power to prescribe the form but must not dispense with material averments or provide for the prosecution of offenses in a manner other than that specified. Yet Mr. Cooley, who is quoted in both of the above cases, says that remedies and modes of procedure are always under the control of the Legislature.<sup>73</sup> Assuming this to be true, if we accept the conclusion in the above-mentioned cases that the Constitution gives no vested right, but merely prescribes a mode of procedure, why may not the Legislature change the mode prescribed, and if it has the power to do so, what guaranty does such a constitutional provision give? Does the same provision give a vested right for some purposes and merely prescribe a mode

that makes an action done before the passing of the law, and which was innocent when done, criminal and punishes such action. Second. Every law that aggravates a crime, or makes it greater than it was when committed. Third. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. Fourth. Every law that alters the legal rule of evidence, and receives less or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

**72.** People v. Campbell, 59 Cal. 243, 43 Am. Rep. 257; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115.

73. See preceding section.

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of procedure for others. We cannot help but disagree with the conclusion reached in these cases and are of the opinion that where a constitutional provision requiring indictment in certain cases is in force at the time a crime, within the cases specified, is committed, the person accused of such crime has a vested right to be prosecuted by indictment and is not subject to the application of an amendment to the Constitution adopted after the commission of the crime and which provides for, or permits of, the prosecution of such crime by information. So it has been said by the United States Supreme Court: "Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by State legislation after the offense was committed and such legislation not be held to be ex post facto because it relates to procedure? And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by ex post facto legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot."73a

§ 44. Crime committed before admission of Territory as State—Right to prosecute by information.—Where an offense is committed during the existence of a territorial government, the residents thereof are subject to the laws of the United States and entitled to the rights given by those laws, one of which is the right that a person shall not be held for a capital or otherwise infamous crime unless on a presentment or indictment of the grand jury, and where an offense is committed during the existence of the territorial government the right of a person to prosecution by indictment or presentment of a grand jury, cannot be affected by a provision of the Constitution of the State, where it is subsequently admitted as a State, providing that all criminal actions in a certain court shall be prosecuted by information. To hold otherwise would give such an act a retrospective operation.<sup>74</sup>

<sup>73</sup>a. Kring v. Missouri, 107 U. S. 74. State v. Kingsley, 10 Mont. 221, 2 S. Ct. 443, per Mr. Justice 537, 26 Pac. 1066.
MILLEB.

So, in Utah it has been decided that one who was charged with the commission of a crime, prior to the admission of the State, had the constitutional right, under the laws of Congress and the territorial laws then in force, to have his case brought before a grand jury and a presentment by indictment of that body in accordance with the laws then in force, and could not be prosecuted by information as provided by the laws of the State after its admission.<sup>75</sup> The court said briefly and to the point in this case: "To hold that a State could deprive the accused of his liberty by examination before a magistrate by the filing of an information by the prosecuting attorney, without the presentment of an indictment found by a grand jury, for an offense committed while Utah was a Territory and under the laws of Congress, would be to recognize in a State power to do that which Congress could not do by legislation, and the right to take from the accused a constitutional right which belonged to him when the offense was com-And in the first case in which this question arose in Washington it was decided that a person accused of grand larceny prior to the admission of that State into the Union was entitled to the guaranty of the United States Constitution of presentment by a grand jury, and could not be prosecuted by information under the provisions of the State Constitution and legislative acts authorizing such a proceeding.<sup>77</sup> But in a later case in Washington, it has been decided that a law changing the mode of procedure in prosecution for crime from an indictment to an information, does not contain any of the elements, or respond to any of the accepted definitions of an ex post facto law, although the offense under prosecution may have been committed prior to such change in the law, and before the admission of the Territory to Statehood.78

# § 45. Legislature may prescribe form of indictment—General rule.—It is a generally accepted rule that the Legislature has

**75.** State v. Rock, 20 Utah, 38, 57 Pac. 532.

76. Per MINER, J.

77. McCarty v. State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152.

78. Lybarger v. State, 2 Wash. 552, 27 Pac. 449, 1029. See, also, State v. Hoyt, 4 Wash. 818, 30 Pac. 1060, citing and following the above case.

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power, subject to certain limitations,<sup>79</sup> to prescribe the form of an indictment,<sup>80</sup> and in so doing it is decided that the Legislature may dispense with mere matters of form,<sup>81</sup> or with averments which would be held necessary and essential to a good common law indictment.<sup>82</sup> So a form of indictment prescribed by statute or code has been held sufficient, though it does not require a recital of the oath of the grand jurors.<sup>83</sup>

§ 46. Limitations on power of Legislature to prescribe form of indictment.—While the Legislature undoubtedly has authority to abbreviate and simplify, and to a certain extent modify and change the forms of indictments, yet its authority in this respect is limited, and it cannot make an indictment valid and sufficient in which the accusation is not set forth with sufficient fullness to enable the accused to know with reasonable certainty what the matter is which he has to meet, and enable the court to see, without going out of the record, that a crime has been committed. And where it is provided by the Constitution that a person shall be exempt from answering any criminal charge except on indictment or information, such provisions place it beyond the power of the Legislature to dispense with the statement in the indictment of that which is essential to the description of the offense.

79. See following section.

80. United States.—Caldwell v. Texas, 137 U. S. 692, 11 S. Ct. 224, 34 L. Ed. 816.

Alabama.—Noles v. State, 24 Ala.

Louisiana.—State v. Mullen, 14 La. Ann. 570.

Maine.—State v. Corson, 59 Me. 137.

**Missouri.**—State v. Morgan, 112 Mo. 202, 20 S. W. 456.

Nevada.—State v. O'Flaherty, 7 Nev. 153; State v. Millain, 3 Nev. 409, 438.

Ohio.—Williams v. State, 35 Ohio St. 175; Wolf v. State, 19 Ohio St. 248; Lougee v. State. 11 Ohio, 68. **Vermont.**—State v. Noakes, 70 Vt. 247, 40 Atl. 249; State v. Comstock, 27 Vt. 553.

Wisconsin.—See State ex rel. Welch v. Sloan, 65 Wis. 647, 27 N. W. 616.

81. Mott v. State, 29 Ark. 147, 149.

82. State v. Morgan, 112 Mo. 202, 20 S. W. 456.

83. State v. Guglielmo, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103.

84. State v. Mace, 76 Me. 64.

85 State v. Duke, 42 Tex. 455, holding that where, by statute, the carrying of concealed weapons is, except in certain cases, a criminal offense, the indictment should negative

And it has been said in this connection: "We do not doubt the power and right of the Legislature to prescribe, change or modify the forms of process or proceedings in all civil actions, and to determine what shall be deemed a sufficient allegation, in form or substance to bring the merits of a case before the court. But, in criminal prosecutions, the exercise of this right is limited and controlled by the paramount law in the Constitution. It has for centuries since the declaration in Magna Charta, been the boast of the common law, that it protects with jealous care the rights of the accused. It not only secures a speedy and impartial trial by jury, but it requires that no person shall be held to answer, until the accusation against him is formally, fully and precisely set forth,—that he may know of what he is accused, and be prepared to meet the exact charge against him. This right of the respondent has ever been regarded as sacred and essential to the protection of the individual citizen. In all the changes of forms, and in the principles and practice of the law, this right has remained untouched and unchanged. \* \* \* Will any one maintain that the Legislature might dispense with a written accusation, or enact that any written charge, however vague or indefinite in its terms, should be sufficient? That, for instance, a general charge, that the accused had violated the law, should be sufficient to hold a man to answer to any crime, from a simple assault to murder? We do not intend to say that the Legislature may not modify or simplify the forms in criminal proceedings, providing the essential matters which clearly set forth an offense are retained."86 So in a case in Missouri, where the constitutional provisions that a prosecution must be by indictment and that "in criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation," were construed by the court it was said in this connection: "This prosecution is by indictment and it is everywhere held, under like constitutional provisions, that

that the weapon was carried under the circumstances allowed; Hewitt v. State, 25 Tex. 722, holding that the Legislature could not dispense with the averment, in an indictment for selling liquor, that it was sold "without having obtained a license therefor."

86. State v. Learned, 47 Me. 426, 432, per RENT, J.

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the Legislature may prescribe a form of indictment, and in doing so may dispense with averments which would be held necessary and essential to a good common law indictment. The limitation and only limitation is that the indictment must furnish to the accused 'the nature and cause of the accusation.' It is a sacred right to the accused that he may know from the indictment of what he is charged, and be prepared to meet the exact charge presented against him." <sup>87</sup> And this doctrine is affirmed in other decisions. <sup>88</sup>

§ 47. Same subject continued.—The Legislature cannot by law authorize the courts to dispense with the allegation in indictments for penal offenses of a material fact, which, under the law alleged to have been violated, forms the main ingredient, or is the gist of the offense. And where a statute imposes a higher penalty where a person is convicted of an offense for which he has been convicted before, the offense which is so punishable is not fully and substantially described to the accused, if the former convictions are not set forth and a statutory provision that it shall not be necessary, in an indictment or complaint thereunder, to allege such previous convictions, is inoperative and void as being in violation of a provision of the Declaration of Rights or Constitution of the State that no one shall be held to answer for any

87. State v. Morgan, 112 Mo. 202, 20 S. W. 456. See, also, State v. Terry, 109 Mo. 601, 19 S. W. 206, wherein it was declared that an indictment means just what it did at common law. The Legislature may change it in form but cannot change the substance of material averments, without infringing upon constitutional guaranties.

88. "Indictment is a common law term, and the courts have necessarily to look to the common law to ascertain its meaning. And whilst we do not doubt the power of the Legislature to dispense with mere matters

of form, the substance of a good common law indictment should be preserved. If one matter of substance may be dispensed with, another may be, and where is the limit to innovations?" Mott v. State, 29 Ark. 147, per English, J.

"It is quite competent for the Legislature to prescribe what shall be the form of an indictment in a given case, provided in so doing they do not contravene any constitutional provision." State v. Comstock, 27 Vt. 553, per Bennett, J.

89. Hewitt v. State, 25 Tex. 722.

crimes or offense until the same is fully and plainly, substantially and formally, described to him. 90 So, though the Legislature may prescribe the form of an indictment or information, the fact that it has seen fit to call an affidavit an information, does not make it one, nor confer on it either the form or functions of an information. 91

§ 48. Power of Legislature to dispense with indictment where provided for by State Constitution.-The power of the Legislature in all matters must be exercised in conformity with the restrictions and limitations imposed by the Constitution of the State, and where it is provided by that instrument that a person accused of certain offenses shall be prosecuted by indictment the Legislature has no power, in the absence of some constitutional provision conferring it, to dispense with the necessity of an indictment in such cases. 92 So, in a case in Ohio, though this question was not directly before the court, it was said, in referring to the right secured by a constitutional provision that "no person shall be put to answer any criminal charge but by presentment, indictment or impeachment." "It is true that no person can be put to answer any criminal charge, but by presentment, indictment, or impeachment. An individual accused of a crime cannot be compelled to answer the charge until the same has been made through the intervention of a grand jury, in the form of a presentment or indictment. Should the Legislature pass an act to compel an individual to answer, without this prerequisite, such act would be in violation of the Constitution, and void. No such power is, as I

Minnesota.—Davis v. Pierse, 7 Minn. 13, 82 Am. Dec. 65.

Missouri.—State v. Morgan, 112 Mo. 202, 20 S. W. 456.

Nevada.—Ex parte Dela, 25 Nev. 346, 60 Pac. 217.

Vermont.—State v. Noakes, 70 Vt. 247, 40 Atl. 249.

See cases cited in § 46 herein: "Limitations on power of Legislature to prescribe form of indictment."

<sup>90.</sup> Commonwealth v. Harrington, 130 Mass. 35.

<sup>91.</sup> State v. Briscoe, 80 Mo. 643; State v. Rockwell, 18 Mo. App. 395.

<sup>92.</sup> Arkansas.—Mott v. State, 29 Ark. 147.

Maine.—State v. Learned, 47 Me. 426.

Massachusetts.—Commonwealth v. Horregan, 127 Mass. 450.

#### § 49 Constitutional and Statutory Provisions.

believe, claimed by any of the numerous advocates for legislative supremacy."<sup>93</sup> So a statute which purports to give an inferior tribunal jurisdiction to impose the punishment of imprisonment in the State prison, which is an infamous punishment, without presentment by a grand jury, is unconstitutional and void.<sup>94</sup> And where the Constitution of a State secured to a person accused of a criminal offense the right to be prosecuted by presentment or indictment of a grand jury, it was held that an act entitled, "An act suspending the privilege of all persons aiding the rebellion against the United States, of prosecuting and defending actions and judicial proceedings in this State," passed by the Legislature, was unconstitutional and void.<sup>95</sup>

§ 49. Indictment essential to jurisdiction where Constitution requires prosecution by.— This right of a person to prosecution by indictment where given by the Constitution of a State is a prerequisite to the jurisdiction of the court to try an accused person. It is one of the indispensible conditions and requirements, the absence of which renders the action of a court in trying one for a crime requiring an indictment not only voidable but absolutely void. So where a person was indicted charged with committing the crime of murder in the perpetration of rape and was tried therefor and convicted of the crime of rape and sentenced therefor, it was decided that the court had no jurisdiction to sentence and imprison him for the latter crime where it was provided by the Constitution of the State that no person should be tried for a capital or otherwise infamous crime except on presentment or indictment of a grand jury. It was said in this case:

**93.** Lougee v. State, 11 Ohio, 68, 70, 71, per HITCHCOCK, J.

94. Commonwealth v. Horregan, 127 Mass. 450, so holding in the case of a statute by which it was attempted to give power to judges of probate courts to try juvenile offenders for offenses which were punishable by an infamous punishment, and also so holding as to similar statute

giving similar power to judges of police, district, and municipal courts. See, also, Nolan's Case, 122 Mass. 330.

95. Davis v. Pierse, 7 Minn. 13, 82 Am. Dec. 65, followed in Jackson v. Butler, 8 Minn. 117; McFarland v. Butler, 8 Minn. 116; Keough v. McNitt, 7 Minn. 30; Wilcox v. Davis, 7 Minn. 23.

"Can it even be pretended that the court, in the face of these direct and prohibitive terms of the Constitution, could render a valid judgment of imprisonment for an offense of which it has jurisdiction, without presentment or indictment charging the particular offense? Would not the action of the court in such proceeding be utterly void, because of excess of jurisdiction, and because it deprived a party of his liberty without due process of law? The question involved is not one of irregularity, growing out of rules of procedure, but is one of substantive law, based upon the direct terms of a constitutional guaranty." <sup>96</sup>

§ 50. Conviction for assault under indictment for manslaughter-Ex post facto law-New York case.-A person who has been indicted by the grand jury for assault in the second degree cannot under such indictment be convicted of assault in any degree under an amendment to the code of criminal procedure providing that "Upon a trial for murder or manslaughter, if the act complained of is not proven to be the cause of death, the defendant may be convicted of assault in any degree constituted by said act, and warranted by the evidence," 97 where such amendment, though operative at the time of the trial, was not passed until after the indictment in question was found by the grand jury. To apply the amendment to such indictment would operate to give it an ex post facto effect and would also be in violation of the constitutional provision that "no person shall be held to answer for a capital or otherwise infamous crime less on presentment or indictment of a grand jury." 98 "The effect of applying this amendment to court said: all indictments pending at the time it became a law, is evidently to deprive the parties named therein of this constitutional right, so far as their trial and conviction for the assault named therein is concerned. It cannot, therefore, be considered that it was the legislative intent to work such a direct violation of constitutional rights as such a retroactive application would effect. It is rather

<sup>96.</sup> Ex parte Dela, 25 Nev. 346, Cr. Proc. Laws 1900, ch. 625.
60 Pac. 217, per Massey, J.
98. People v. Cox, 67 App. Div.
97. Amend. to § 444 N. Y. Code (N. Y.) 344, 73 N. Y. Supp. 774.

to be held that it was intended to apply only to cases arising after and under it, and in which it could be enforced without violating any constitutional or other rights." 99

§ 51. Legislature may dispense with indictment where authorized by Constitution.—In some States, though the Constitution provides for indictment in the case of certain crimes, power is also conferred by such instrument upon the Legislature to change, regulate or dispense with the grand jury system and where the Legislature is so authorized it may provide for the prosecution of offenses by information, though they may be within the class of offenses for the prosecution of which an indictment was necessary under the Constitution. 1 So in Wyoming this question is considered where it was provided by the Constitution of the State that "the Legislature may change, regulate or abolish the grand jury system," and that "until otherwise provided by law no person shall for a felony be proceeded against criminally otherwise than by indictment," and it was decided that a statute providing for prosecution by information was constitutional. said: "The intention appears clearly in our Constitution that there should be no constitutional guaranty of a presentment or indictment of a grand jury, and that nothing should impede the right of the Legislature to change, regulate or abolish the grand jury system."3

99. Per PARKER, J.

1. Alabama.—Witt v. State, 130 Ala. 129, 30 So. 473; Ala. Const., art. 1, § 9.

Colorado.—In Matter of Constitutionality of House Bill No. 158, 9 Colo. 625; Colo. Const., art. 2, \$ 8; see, also, In re Dolph, 17 Colo. 35, 28 Pac. 470, cited and followed in Nesbit v. People, 19 Colo. 441, 36 Pac. 221; Jordan v. People, 19 Colo. 417, 36 Pac. 218.

Nebraska.—Bolln v. State, 51 Neb. 881, 71 N. W. 444; Neb. Const., § 10, art. 1; Mill v. State, 29 Neb. 437, 45 N. W. 451. North Carolina.—State v. Thornton, 136 N. C. 610, 48 S. E. 602; State v. Crook, 91 N. C. 536; No. Car. Const., art. 1, § 13; art. 4, § 27.

**Oregon.**—State v. Guglielmo, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103; Ore. Const., art. 7, § 18.

**South Dakota.**—State v. Ayers, 8 S. D. 517, 67 N. W. 611.

**Wyoming.**—In re Wright, 3 Wyo. 478, 27 Pac. 565, 31 Am. Rep. 94, 13 L. R. A. 748.

2. Const. Wyo., art. 1, §§ 9, 13.

In re Wright, 3 Wyo. 478, 27
 Pac. 565, 31 Am. Rep. 94, 13 L. R. A.
 748, per Geoesbeck, J.

And in a later case in this State it is declared that: "It is now too late to challenge procedure by information as not 'due process' of law under the constitutional provisions relating thereto. The matter has been before this court, and our decision sustaining such a procedure is upheld by an overwhelming weight of authority, if not by all of the precedents." And where power is conferred by the Constitution upon the Legislature to modify or abolish the grand jury system, an act of the Legislature providing merely for the prosecution of criminal offenses by information instead of by indictment as required by a constitutional provision referring to that class of offense is not in violation of such provision. The fact that the Legislature has not absolutely abolished grand juries does not still confer the constitutional right upon an individual to demand and require that the accusation against him be by indictment of a grand jury.

§ 52. Whether constitutional provision for prosecution by information instead of indictment is self-executing.—The question whether a constitutional provision authorizing the prosecution of offenses by information instead of indictment, or making indictment and information concurrent remedies is self-executing, is one upon which the decisions, which are few, are not in harmony.

In Montana it has been decided that an accused person is entitled to the right of prosecution for a felony by indictment, though the Constitution of the State may provide that all criminal actions in a certain court shall be prosecuted by information, where it appears that there has been no legislation to set in motion the provisions of the Constitution, it being declared that such a provision is not self-executing. The court said that the contention in such a case that the same result is attained by the express adoption of the common law in England when the same "is applicable and not in conflict with special enactments" is not sound, as the

<sup>4.</sup> In re Boulter, 5 Wyo. 329, 40 Pac. 520, per Geoesseck, J., citing In re Wright, 3 Wyo. 478, 27 Pac. 565; Rouen v. State, 30 Wis. 129;

Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 292.

<sup>5.</sup> State v. Tucker, 36 Ore. 291, 61 Pac. 894, 51 L. R. A. 246.

remedy at common law did not embrace felonies.6 But a constitutional provision that "no person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury, or on information of the public prosecutor, after a commitment by a magistrate," which provision was similar to that in the Montana case just referred to, has been held by the United States Supreme Court to be self-executing.7 Missouri it has been decided that an amendment to the Constitution, providing that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment, or information, which shall be concurrent remedies," being one which pertains to criminal procedure and prohibitory in character is selfoperating.8 From an examination of these decisions it will be seen

- 6. State v. Ah Jim, 9 Mont. 166, 23 Pac. 76, wherein the court said: "The clause of the Constitution respecting the information does not execute itself. All the details affecting the exercise, jurisdiction, and limitations of the procedure, and the rights and pleadings of the State and accused, must be defined by the legislative department," per Blake, J. See, also, In re Durban, 10 Mont. 147, 25 Pac. 442.
- 7. Davis v. Burke, 179 U. S. 399, 21 S. Ct. 210, 45 L. Ed. 399. Justice Brown said in this case: "Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words it is self executing only so far as it is susceptible of execution. But where a constitution asserts a certain right, or lays a
- certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions. In short, if complete in itself, it executes itself. When a Constitution declares that felonies may be prosecuted by information after a commitment by a magistrate, we understand exactly what is meant, since informations for the prosecution of minor offenses are said by Blackstone to be as old as the common law itself, and a proceeding before magistrates for the apprehension and commitment of persons charged with crime has been the usual method of procedure since the adoption of the Constitution."
- 8. State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115, construing amendment of § 12 of art. 2, of the State Constitution. The court "There is nothing in the language used in the amendment which indicates that subsequent legislation was necessary or intended to carry it into effect, nor was it, as it simply prohibits any other mode for the

that the Montana cases are opposed to the doctrine of the Missouri case, and apparently in direct conflict with the doctrine enunciated by the United States Supreme Court decision. In the consideration of this question it should be remembered that both "indictment" and "information" are derived from the common law, recourse to which is essential to determine their meaning as used in a constitutional provision.9 It is true that at common law prosecution by information was not permissible in case of felonies. was, however, permitted in the case of misdemeanors, and in this class of cases the meaning of the word "information" was well understood. It would therefore seem that having a well-known meaning as used in prosecuting misdemeanors it would be immaterial that felonies were not so prosecuted at common law, and that a constitutional provision permitting the prosecution of a felony on information of the public prosecutor after a commitment by a magistrate would be interpreted with regard to the common law procedure by information, and would be self-execut-Where a constitutional provision as to prosecution by information is self-executing one convicted thereunder is not denied due process of law.10

§ 53. Changing charge in indictment—Power of courts as to.—A trial court has no power, even though the accused person may consent thereto, to change the charge in an indictment. The finding of an indictment is an act solely within the power of the grand jury to perform and it is for it to determine whether a person shall be indicted and the offense with which he shall be charged. So in a case where a change in the charge was directed by the court to be made it was said: "Such a power is unknown to the law and the act is not in conformity with the law of the land. If the judge could, with the consent of the defendant, thus alter the charge there is no reason why a judge may not, in any case, usurp the functions of the grand jury and change the nature of any

prosecution of felonies (except certain cases as herein provided), otherwise than by indictment or information," per Burgess, J.

9. See §§ 8, 11, herein.

10. Davis v. Burke, 179 U. S. 399, 21 S. Ct. 210, 45 L. Ed. 399. Examine In re Durbon, 10 Mont. 147, 25 Pac. 442.

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offense, as fixed by its presentment, provided the party accused Such a practice would be contrary to consents to the alteration. good policy. \* \* \* To virtually divest the grand jury of the right to say for what a man shall be tried, and strip it of a power, which, in our State, it has always possessed, and vest it in one man, would, in our opinion, be highly dangerous to the public interests, and is unquestionably in violation of law." 11 So it has been declared by the court in a case in Nevada that an indictment "manifestly means a written accusation made and presented by the inquisition known as a grand jury. But if, after being presented to the court, an indictment so found be in any particular materially modified or altered; if anything of substance be added to or taken therefrom by the court, it cannot with any degree of propriety be denominated an indictment of a grand jury. If the courts have the power to add to or take from anything material in an indictment, where is the limit to that power? If one can arrogate to itself any portion, upon what rule could it be held that it should not take upon itself the entire duties of the grand jury? Clearly no indictment upon which a person can be legally tried can be found except by a grand jury, and the courts have no more authority to add any material charge, accusation or allegation to it than they have to find the bill in the first instance."12 So where a person was being tried on an indictment charging him with murder and the court refused to receive evidence showing that certain words had been inserted in the indictment after it was filed, by which the indictment as originally found for manslaughter had been changed to one for murder, it was decided on appeal that such evidence should have been admitted and that the court could not acquire jurisdiction to try him for the latter crime. even though the accused had consented to or waived the change. The court said: "The indictment as it stood before the alleged alterations were made, only charged the defendant with the crime of manslaughter, but, as altered, it charged him with the crime of murder. The court under that indictment had no jurisdiction to

<sup>11.</sup> Commonwealth v. Adams, 92

Ry. 134, 17 S. W. 276, 13 Ky. Law 257, 260, per Lewis, J. Rep. 440, per Holt, J.

try him for any crime other than such as was charged in the indictment when it was filed by the grand jury. Consent on the part of the defendant, whether given directly or inferred from his acts or omissions, cannot confer jurisdiction upon the court to try the defendant for any other crime than such as is charged in the indictment, as found and returned by the grand jury." <sup>13</sup>

- § 54. Legislature has no power to authorize court to change charge in indictment.—The Legislature has no power to condemn a particular act as an indictable offense, and then empower the courts in the prosecution of a party for the commission of the act thus condemned, to substitute in the indictment and proof of it a different act, which is not the same and is not itself prohibited by law. A constitutional provision that "no citizen of this State shall be deprived of life, liberty, property or privileges, outlawed, exiled, or, in any manner, disfranchised, except by due course of the law of the land" is said to apply with great force in such a case.<sup>14</sup>
- § 55. Constitutional provision requiring indictment for offenses punishable with imprisonment for life construed.—An act of the Legislature prescribing the kind of punishment which shall be imposed for a certain offense, which is imprisonment for a certain number of years, and prescribes the minimum but no maximum punishment, is not unconstitutional as in violation of a constitutional provision that "no person shall be holden to answer for any crime, the punishment of which may be death or imprisonment for life, unless on a presentment or indictment of a grand jury." <sup>15</sup>
- 13. People v. Granice, 50 Cal. 447, per the court.
- 14. Hewitt v. State, 25 Tex. 722.
  15. Romero v. State, 60 Conn. 92,
  22 Atl. 496, construing art. 1, § 9, of
  the State Constitution and Gen.

Stat., § 1404, which provided that: "Every person who shall assault another, with intent to commit murder, \* \* \* shall be imprisoned in the State prison not less than ten years." The court said: "The obscurity arises from the fact that the statute prescribes a minimum punishment but no maximum. But the kind of punishment is prescribed, which is imprisonment for a definite term of years, for a prescribed punishment of not less than ten years' imprisonment is the same as one for a term of

- § 56. Right of State to provide for prosecution by information as affected by treaty.—This question is considered in a recent case in Missouri, where it was contended that a prosecution by information for murder was in contravention of the treaty of cession between the United States and France, by which the Louisiana Territory was ceded to the United States. This treaty provided that: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States." The court, however, after considering this provision in connection with the fifth and fourteenth amendments to the United States Constitution declared that the right was not secured by the Federal Constituion to a citizen of any state to be prosecuted by indictment, that a State might provide for the prosecution of felonies by information and that therefore the defendant in this case was not deprived of any of the rights, advantages or immunities guaranteed to the citizens of the United States.16
- § 57. Code provision as to indictment against accessory and principal—Constitutionality of.—A constitutional provision giving to an accused person the right to demand the nature and cause of the accusation against him is not violated by a statutory

years not less than ten. The only discretion the court has in going above ten years is merely to add to the number. But a definite number of years must be specified, otherwise the sentence would be void for uncertainty. It may, however, be suggested in this connection that imprisonment for life in its result is only for a certain number of years, and that if the sentence is long enough to cover the entire life of a person, there is no practical difference. But such reasoning overlooks the fact that in contemplation of the

law a sentence to imprisonment for life is perfectly distinct from that for a term of years, and one is never the equivalent of the other without express statutory authority. Our law has always regarded imprisonment for life as a punishment much greater in degree than imprisonment for a term of years, and in our statutes the latter is classed under the head of 'less than life,'" per LOOMIS, J.

16. State v. Rudolph, 187 Mo. 67, 85 S. W. 584.

or code provision that in an indictment against an accessory it shall not be necessary to state any other facts than are required in an indictment against the principal.<sup>17</sup>

17. State v. Geddes, 22 Mont. 68, 55 Pac. 919, construing Mont. Pen. Code, § 1852, providing that "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commis-

sion, though not present, must be prosecuted, tried and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory, than are required in an indictment or information against his principal."

#### CHAPTER IV.

#### Power and Jurisdiction of Grand Jury.

#### Section

- 58. Origin of grand jury; powers of generally.
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- 85. Expression of opinion by grand juror as ground of objection.
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- 98. Word "trial" in act providing for special term construed.
- Power to find indictment at term other than that following commitment.
- 100. Same subject; under particular statutes.
- 101. Indictment found pending habeas corpus proceedings.
- 102. Constitutional provision as to right to be heard construed.
- 103. Indictment must be founded upon evidence.
- § 58. Origin of grand jury Powers of generally. The grand jury, which dates back to an early period in the history of England, is a body formed for the purpose of making investigations and accusations of crime. For many centuries it has been regarded as a security to the individual of his rights and as preventing persecution in the name of the king, and its object at the present time is to prevent unjust or unlawful prosecution of the individual in the name of the public. So the Magna Charta forbade that felonies should be prosecuted in any other manner than by indictment or presentment,1 and a provision securing the right to an indictment by the grand jury in the case of felonies was incorporated into the Federal Constitution and also into the Constitution of most of the States.<sup>2</sup> The history of the origin and powers of the grand jury can not be better expressed than in the words of Justice Field, as follows:
  - 1. State v. Cannon, 29 Mo. 330.
- 2. "The investigation by a grand jury of 'a capital or infamous crime' of which a party may be ac-

cused, has been regarded for centuries as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as

"The institution of the grand jury is of very ancient origin in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the account of commentators on the laws of that country, that it was at first a body which not only accused, but which also tried public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded persecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government, yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under

one of the ancient immunities and bulwarks of personal liberty. The provision now found in the Federal Constitution originated as an amendment to the original Constitution, introduced in the nature of a bill of rights, at the first session of Congress in 1789, the more carefully to

guard the security of the citizen against vindictive prosecutions, either by the government, political partisans, or by private enemies." Butler v. Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764n, per Foster, J.

the solemnity of an oath, that there is good reason for his accusation and trial." 3

§ 59. Power of grand jury to indict on knowledge of members. -A grand jury has power to find an indictment against a person founded upon matters within the knowledge of its members,4 and a grand juror may appear as a witness before the grand jury of which he is a member and the latter may properly act upon the personal knowledge of any of its members communicated to his fellows under no other sanction than the grand juror's oath.5 So when in the progress of an investigation of a case by the grand jury it develops from the testimony of a witness that an offense has been committed altogether disconnected from the case under consideration, it is entirely proper for the grand jury to cause a special presentment to be preferred for such offense and require the witnesses to appear and be sworn on the consideration of the presentment thus preferred. It is not only the privilege but the duty of the grand jury to present all offenders where the offense comes to their knowledge during the time of their service, and it is immaterial in what way the information is received.<sup>6</sup> And it is not necessary that a presentment made upon the knowledge or information of a grand jury should show upon its face or elsewhere that it was so made and it will not be presumed that a presentment was made upon the knowledge of the members of a grand jury from the fact that no prosecutor was marked upon the presentment.7 And it is held to be no ground for setting aside an

3. Ex parte Bain, 121 U. S. 1, 10, 7 S. Ct. 781, quoting language of Justice FIELD in a charge to the grand jury reported in 2 Sawyer 667.

4. State v. Richard, 50 La. Ann. 210, 23 So. 331; State v. Terry, 30 Mo. 368. See Groves v. State, 73 Ga. 205, overruling Hawkins v. State, 54 Ga. 653, 658, which held that a grand jury cannot, from their own knowledge or observation, without any bill of indictment laid before them at the

instance of a prosecutor, make a special presentment of a justice of the peace for malpractice in office.

5. Commonwealth v. Hayden, 163 Mass. 453, 40 N. E. 846, 28 L. R. 318, 47 Am. St. Rep. 468.

**6.** Oglesby v. State, 121 Ga. 602, 49 S. E. 706.

State v. Lewis, 87 Tenn. 119, 9
 W. 427; State v. Lee, 87 Tenn. 114, 9
 W. 425.

indictment for arson that some of the grand jurors had knowledge that the building was burned, it being declared that knowledge of such fact does not disqualify them from ascertaining whether the building was feloniously burned and who was probably the guilty party.<sup>8</sup>

§ 60. Validity of indictment not affected by failure to designate term as provided by statute.—There is held to be no substantial ground upon which the legality or regularity of the court where the indictment was found can be questioned from the fact that it is provided by code that the designation of trial terms shall be made before a certain date and they are not made until a day subsequent to that specified, it being declared that such a provision is directory merely and that the observance of the date is not essential to the jurisdiction to perform the act.<sup>9</sup> And under a similar statute in Ohio it is decided that a judge of the Court of Common Pleas has authority to hold court in any

8. People v. Breen, 130 Cal. 72, 62 Pac. 408.

9. People v. Youngs, 151 N. Y. 210, 45 N. E. 460, construing Code Civ. Proc., § 232. Judge O'BRIEN "The defendant said in this case: was indicted at a term of the court held on January 20th, 1896, which was appointed by the justices of the Appellate Division in the third department on December 3d. 1895. January 1st, 1896, the same justices reconvened and made appointments for terms of courts as before, thus ratifying what had been done at their first meeting. The justices were required to make these appointments by article 6, section 2, of the new Constitution, and also by section 232 of the Code of Civil Procedure. is true that by the provisions of the code they were required to make the appointments before the first day of

December, 1895; but this we think was directory, and the fact that they did not make the designations until three days afterwards, does not, we think, affect the validity of the act. Constitution conferred them this power in explicit language, and their jurisdiction was not affected by the circumstances that the act was not performed on the precise day that the Legislature had designated for that purpose. Constitution required them to perform this duty without designating any time, and the Legislature under the Constitution had directed the performance of the act prior to the first of December. The designation of the particular day was, as we have already remarked, directory, and the observance of the date was not essential to the jurisdiction to perform the act."

county in his district, though not designated by the judges of the district, as provided by statutes, to hold court in that county; and an indictment found and returned at a term so held is not invalid, either because the judge holding the term was not designated to hold the same or because the judges of the district failed to apportion the labor of holding the court among themselves, and to issue an order specifying the term to be held by each judge. 10

§ 61. Grand jury must have jurisdiction.—It is essential to the validity of an indictment that the grand jury by which it was found had jurisdiction to inquire into the matter and to find the indictment.<sup>11</sup> "Without jurisdiction they have no power to investigate the charge or present the accused for trial, and a presentment made under such circumstances has no more effect in law than if made by the jurors in their capacity as private citizens. The accused cannot be held to plead to it and no witness at such an inquiry could be held for perjury, however falsely he may have sworn. So, also, upon a general demurrer that no crime is stated, the same inquiry must always arise since it is legally

10. State v. Thomas, 61 Ohio St. 444, 56 N. E. 276, 48 L. R. A. 457, construing Rev. Stat. 468.

11. United States.—Post v. United States, 161 U. S. 583, 16 Sup. Ct. 611, 40 L. Ed. 816; United States v. Hill, Fed. Cas. No. 15364. See In re Fires, Fed. Cas. No. 5126, 3 Dall. 515

Alabama.—Hughes v. State, 35 Ala. 351; Putzell v. State, 15 Ark.

Indiana.—Shepherd v. State, 64 Ind. 43; State v. Henning, 33 Ind. 189; Beal v. State, 15 Ind. 378.

Maine.—State v. Doherty, 60 Me. 504; State v. Jackson, 32 Me. 40.

Missouri.—State v. Simley, 98 Mo. 605, 12 S. W. 247; Ex parte Slater, 72 Mo. 102. Montana.—See Territory v. Corbett, 3 Mont. 50.

New York.—People v. McCarthy, 168 N. Y. 549, 61 N. E. 899; People v. Knatt, 156 N. Y. 302, 50 N. E. 835; People v. Dimick, 107 N. Y. 13, 14 N. E. 178.

commencement of proceedings as affecting jurisdiction of court. "The submission of a bill of indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced." Post v. United States, 161 U. S. 583, 16 S. Ct. 611, 40 L. Ed. 816, per Mr. Justice Gray.

impossible for a grand jury to charge any crime unless there is jurisdiction. Therefore, in every inquiry, whether the paper before the court is an indictment at all in the legal sense, or whether it charges a crime which the accused is required to answer, there must necessarily be involved the question of the jurisdiction of the grand jury." 12 So where a grand jury was impanelled in the Circuit Court of a county and an indictment was returned by said jury into said court, after the act creating a criminal Circuit Court in that county went into force but before the first term of the latter court, it was decided on a motion to quash, in the criminal Circuit Court to which the case was transferred, that the court in which the indictment was found had no jurisdiction.<sup>13</sup> And where the return of a judge's certificate to the district attorney was a pre-requisite to his presenting a charge to the grand jury it was decided that, no certificate being returned, the grand jury had no jurisdiction to find an indictment.14 The question as to the jurisdiction of the court may be raised by a general demurrer.<sup>15</sup> But an omission to set forth that the grand jury are of the county in which the court is held is not such a defect as will vitiate the indictment where the name of the county is correctly laid in the margin. "At common law it does not seem to have been the practice to repeat the name of the county

People v. Knatt, 156 N. Y. 302,
 N. E. 835, per O'BRIEN, J.

13. State v. Henning, 33 Ind. 189.

14. People v. Knatt, 156 N. Y. 302, 50 N. E. 835, holding that an indictment must show upon its face the facts necessary to confer jurisdiction upon the court in which it is found.

15. People v. Knatt, 156 N. Y. 302, 50 N. E. 835, wherein the court said in this connection: "It was always the law that a general demurrer to an indictment brought the whole record before the court and the inquiry was then open whether the court in which the indictment was found had jurisdiction. (1 Bishop

Crim. Pro., §§ 741, 775; 1 Arch. Crim. Pro. [8th ed.] 355.) In reason and in the nature of things that must be so, since there can be no indictment at all in any legal sense, unless it appears that the grand jury had jurisdiction. . . So, also, upon a general demurrer that no crime is stated, the same inquiry must always arise, since it is legally impossible for a grand jury to charge any crime unless there is jurisdiction. . . . The scope and effect of a general demurrer at common law has not been changed by the Code, unless it be to enlarge it." Per O'BRIEN, J. in the caption, but only to refer to the name in the margin as in the said county.<sup>16</sup>

- § 62. Jurisdiction of grand jury co-extensive with, and limited by, that of court.—The jurisdiction of the grand jury is co-extensive with that of the court for which they are to inquire, both as to the extent of the territory and the offenses to be investigated.<sup>17</sup> So the jurisdiction of Federal grand jury is only co-extensive with. and is limited by, the jurisdiction of the court for which it is to inquire, there being no express act of Congress defining their powers. Grand juries are accessories to the criminal jurisdiction of a court, and they have power to act and are bound to act, so far as they can aid that jurisdiction. Thus far the power is implied and is as legitimate as if expressly given. To suppose the powers of a grand jury, created, not by express statute, but by the necessity of their aiding the jurisdiction of the court to transcend that jurisdiction, would be to consider grand juries once convened, to be clothed with powers not conferred by law, but originating with themselves. This has never been imagined. It follows then, that, in the general, the grand juries which are summoned to attend the courts of the United States, possess powers and duties co-extensive with the jurisdiction of the courts which they attend."18
- § 63. Indictment must be by grand jury of county where offense committed.—A constitutional provision that a person cannot be proceeded against for a felony otherwise than by indictment is also to be construed with reference to the common law in determining, whether an indictment may be found by a grand jury of any other county than that in which the offense was committed. And it being a common law doctrine that crimes shall only be prosecuted in the county in which they were committed it has been decided that under a constitutional provision of the above

<sup>16.</sup> Guy v. State, 1 Kan. 448, 452.
17. Keitler v. State, 4 G. Greene (Iowa), 291; Territory v. Corbett, 3 MARSHALL, C. J.
Mont. 50.
18. United States v. Hill, 26 Fed. Cas. No. 15,364, 1 Brock. 156, per MARSHALL, C. J.

nature, an indictment must be found by the grand jury of that county of the State in which the offense was committed. And in such a case the Legislature has no power to provide otherwise. But the right of an accused person to demand that he shall be indicted by the grand jury of the county in which the criminal act is alleged to have been committed is not an absolute and indefeasible right which cannot be waived or surrendered. In

§ 64. Same subject—When not necessary.—In a case in New York it has been decided that the Legislature has power to provide that a person committing a burglary and larceny in one county and carrying the stolen property into another county may be indicted, tried and convicted in the latter county as if the crime had been there committed.22 It was declared in this case that while at common law a grand jury could not regularly inquire of a fact done out of the county for which they were sworn, yet that a grand jury might be specially enabled so to do by act of Parliament and that though under the Bill of Rights it would ordinarily be the rule that a person must be indicted by the grand jury of the county where the crime was committed, yet that the Bill of Rights must be read and construed in the light of the law in existence when it was adopted which recognized the legislative authority to provide otherwise.23 Where statutes authorize indictments when goods are stolen in one county and carried by the thief into another county to be found in any county in which they may be carried by the taker, they are to be upheld on the ground that in such cases the larceny is continuous and that the taking of the goods, stolen from one county into another county involves a new caption in such county.24

19. Ex parte Slater, 72 Mo. 102.

20. State v. Smiley, 98 Mo. 605, 12 S. W. 247, construing R. S. 1879, \$ 1536, providing that "An indictment for bigamy . . . may be found, and proceedings, trial, conviction, judgment and execution thereon had, in the county in which such second or subsequent marriage or cohab-

itation shall have taken place, or in the county in which the offender may be apprehended."

21. Parker v. Commonwealth, 12 Bush (Ky.), 191.

22. Mack v. People, 82 N. Y. 235.

23. Per Folger, J.

24. Ex parte Slater, 72 Me. 102.

§ 65. Summoning grand jury from portion of district not violation of Federal Constitution.—The amendment to the United States Constitution providing that "in all criminal prosecutions the accused shall enjoy a right to a speedy trial by an impartial jury of the State and district wherein the crime shall have been committed" is not violated by a direction by the court in the venire issued by a Federal court that a grand jury shall be summoned from a certain portion or division of the district, as is allowed by provision of the United States Revised Statutes.<sup>25</sup>

25. United States v. Ayres, 46 Fed. 651, construing U. S. Const., amend, 6, and U. S. Rev. St., § 802. Judge Shiras said in this connec-"The motion to quash the indictment is based upon the claim that it is not within the power of the court to cause a grand jury to be summoned from a certain portion or division of the district, and that if such limitation is made in the venire a jury summoned in accordance with its provisions would not be a legal grand jury, and therefore indictments returned by such a body would not be valid. In support of the motion, reference is made to the sixth amendment to the Constitution of the United States, which provides that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.' Even if the construction of this amendment is admissible that would hold it applicable to grand juries, it does not bear the meaning sought to be given it, for its purpose was to prevent the evil of a person charged with a criminal offense being taken

for trial to some distant place. burden to litigants in being compelled to follow the king's progresses throughout England had become so great at an early day that it called for correction in Magna Charta, by the provisions of which the Court of Common Pleas was fixed at Westminster, and assizes were required to be held in the different counties. Indeed it became a recognized principle of the common law that one accused of crime was entitled to a trial before a jury of the vicinage. the Constitution of the United States was adopted, the need of extending proper protection in this particular was at once perceived and the sixth amendment was, with others, submitted to the State by the first Congress assembling after its adoption, to wit, in September, 1789. same Congress in adopting the judiciary act, approved September 24, 1789, by section 29 thereof, enacted: 'That in cases punishable with death, the trial shall be had in the county where the offense was committed, or, when that cannot be done, without great inconvenience, twelve petit jurors, at least, shall be summoned from thence, and jurors in all cases to serve in the courts of the United

§ 66. Grand jury impanelled before offense committed—Indictment valid.—The fact that a grand jury was impanelled before the alleged offense was committed, is no ground for quashing an indictment. In this connection it is said in an early case in California in which this question arose: "It cannot be questioned that the powers of the grand jury are general, to inquire into and present all offenses which occur in the county. There is no qualification in the statute as to the time of their commission, except that constituted by statutes of limitation. There is no reason, apart from express statutory provisions which should prevent immediate action by a grand jury when a crime is committed, while many reasons exist for promptness of proceeding. There is no force in the suggestion, that the term of a court is considered by fiction of law to be but one day, and therefore the anomaly might appear, that the indictment was found before the offense was committed. The fictions of law are never permitted to defeat justice, but are only used to advance it; and whenever

States shall be designated by lot or otherwise in each State, respectively, according to the mode of forming juries therein now practiced, and shall be returned, as there shall be occasion for them, from such parts of the district, from time to time, as the court shall direct, so as shall be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services. vision of the statute authorizing the court to direct what parts of the district a given jury, grand or petit, shall be summoned from, has remained a part of the statute law since its adoption in 1789, and now forms section 802 of the Revised Statutes; and I have no doubt that it has been acted upon in all, or nearly all, the districts of the Union.

Its constitutionality cannot be successfully impeached at this late day, and if constitutional it cannot be questioned that its provisions fully sustain the action of the court in directing that the grand jury summoned for the term at Sioux Falls, and which found the present indictment, should be drawn from the parts of the district named in the venire. The purpose of the court in directing the jury to be summoned from a part only of the district was to save unnecessary expense to the government, and to limit the burden upon the citizens who should be selected for jury duty; and, in so doing, the court simply performed the duty which the statute places upon the court, and which the court is required to perform."

See United States v. Charres, 40 Fed. 820.

time becomes important, courts will inquire into a day or even a fractional portion of a day." <sup>26</sup>

- § 67. Court divested of jurisdiction by indictment—Statute.— Though by statute a certain court is given exclusive jurisdiction of offenses, yet if there is a statutory reservation or exception that such court shall be divested of its jurisdiction in such cases if, at any time, before trial, a grand jury shall present an indictment for the same offense, the grand jury may indict for an offense in the class specified, the only limitation upon its authority being that the indictment must be found and presented before the trial and if it is so found and presented it will operate to divest the court of its exclusive jurisdiction.<sup>27</sup>
- § 68. Grand jury must be a legal body.—The constitutional provision that no person shall be held to answer for a criminal offense unless on an indictment or presentment of a grand jury gives to an accused person the right to insist that the indictment shall be found by a grand jury which is legal. "If the indictment is not found by a legal grand jury, it is not found by a grand jury at all, and therefore a person can not be held to answer an offense charged in an indictment found by a grand jury unauthorized by law."<sup>28</sup> As is said in a case in Oklahoma; if it be

26. People v. Beatty, 14 Cal. 570, per Baldwin, J.

27. People v. McCarthy, 168 N. Y. 549, 61 N. E. 899, affg. 59 App. Div. 231, 69 N. Y. Supp. 513, construing § 1406 of the charter of the city of New York (N. Y. L. 1897, c. 378).

28. Norris' House v. State, 3 G. Greene (Iowa), 513, 519, per KINNEY, J., holding under a code provision that the number of grand jurors must be fifteen and that an indictment found by a jury of less than fifteen, though approved by twelve jurors, was not good. The court said in this connection: "It was left for

the Legislature to define how many persons should be sufficient to compose this body and to provide for its selection and organization. ingly, they have provided, in § 1642 of the Code, that 'when grand jurors are to be selected, their number must be fifteen, and they shall serve for one entire year thereafter.' requisite number of jurors do not appear by the time appointed, the court may at any time direct the sheriff to summon forthwith the number necessary to make up the deficiency, § 1647. The number of jurors must be "It was left for--fixed as above, § 1648. And it is pro-

not substantial error for a trial court to refuse to permit the defendant to produce evidence showing the invalidity of an indictment, "then the constitutional right of one accused of crime may be taken from him and he may be held to answer to a capital or otherwise infamous crime without a presentment or indictment of a grand jury. The Constitution, in guaranteeing this right to persons accused of crime, did not mean a mere form of indictment. but meant a valid indictment, found and presented in accordance with the ancient and just rules and safeguards of law, provided for the organization, action and conduct of grand juries."29 So it is said in this connection that courts are strict in discountenancing irregularities in the mode of selecting and impanelling grand jurors, and that the decided weight of American authority is that objection may be taken to the irregularity of plea in abatement.30 It is therefore essential to the validity of an indictment that the grand jury should be drawn, summoned

vided in § 2881 that 'on the first day of the term of the court for which a grand jury has been summoned, they must be called, and if fifteen do not appear, or if the number appearing be reduced to less than fifteen, the court may order the sheriff of the county to summon a sufficient number of qualified persons to complete the panel. It is clear from the above sections of the Code that a grand jury must be composed of fifteen persons, and that a less number is not The Legislature have permitted. carefully provided for all possible contingencies so as to prevent a reduction from the number required, and to preserve without any encroachment the number fifteen as fixed by law. This number and this alone unimpaired is absolutely necessary to constitute a grand jury, and hence if this number is in the least diminished there is no legal grand jury in contemplation of law. If a less number

than fifteen is sufficient to form the body, then indeed could the number be reduced so that even the appearance of a grand jury could not remain. But it is said in reply to this that it is only necessary for twelve to concur in finding a bill, and hence after the grand jury is organized, the court has a right to reduce the number down to twelve. This position is unsound, and at variance both with the letter and spirit of the law. is only required that twelve concur in finding a bill, but the other three cannot in any manner be dispensed with. They are as essential in order to maintain the organization and action of the grand jury as though the law required the entire number to agree in finding an indictment." Per KINNEY, J.

29. Royce v. Territory of Oklahoma, 5 Okla. 61, 69, 47 Pac. 1083. per TABSNEY, J.

30. Wilburn v. State, 21 Ark. 198.

and impanelled in the manner provided by law, and if a grand jury is not a legally organized body in accordance with the requirements of law, an indictment found by it will be of no force and will be quashed.<sup>31</sup> And the record must affirmatively show the organization of the grand jury; and an endorsement on an indictment, which purports to be signed by the foreman of the grand jury, is not sufficient proof of that fact.<sup>32</sup> where it does not affirmatively appear that the grand jury is an unlawful body, any irregularity in selecting and impanelling it should in general be raised before plea, by challenging the array, and not by a motion in arrest of judgment.33 And where the record shows that the grand jury is organized under the supervision of the court and nothing affirmatively appears thereon, to the contrary, it will be presumed that the grand jury was legally organized.34 The burden of showing irregularities in the organization of a grand jury, rests upon the defendant, and the State is not required in the first instance to establish a compliance with the law.35

31. United States.—Ex parte Farley, 40 Fed. 66.

**Alabama.**—Hall v. State, 134 Ala. 90, 32 So. 750; Nixon v. State, 68 Ala. 535; Parmer v. State, 41 Ala. 416.

Arkansas.—Wilburn v. State, 21 Ark. 198.

California.—Levey v. Wilson, 69 Cal. 106.

Iowa.—State v. Bowman, 73 Iowa, 110, 34 N. W. 767.

Maine.—State v. Symonds, 36 Me.

Maryland.—State v. Vincent, 91 Md. 718, 47 Atl. 1036, 52 L. R. A. 83; Clare v. State, 30 Md. 163.

Miss. 356, 69 Am. Dec. 351; Weeks v. State, 31 Miss. 490.

Nevada.—State v. McNamara, 3 Nev. 70.

New Jersey .- State v. Rockafel-

low, 6 N. J. L. 332; Nichols v. State, 5 N. J. L. 539.

New York.—People v. Duff, 1 N. Y. Cr. R. 307; People v. Scannell, 37 Misc. 345, 75 N. Y. Supp. 500.

North Carolina.—State v. Sharp, 110 N. C. 604, 14 S. E. 504.

Ohio.—Huling v. State, 17 Ohio St. 583.

**Rhode Island.**—State v. Davis, 12 R. I. 492, 34 Am. Rep. 704.

Tennessee.—State v. Duncan, 7 Yerg. 271.

Texas.—Lewis v. State, 42 Tex. Cr. 278; Wells v. State, 21 Tex. App. 594, 2 S. W. 806; Rainey v. State, 19 Tex. App. 479; McNeese v. State, 19 Tex. App. 48.

32. Parmer v. State. 41 Ala. 416.

33. Wilson v. People, 3 Col. 328.

**34.** Chase v. State, 46 Miss. 683.

35. State v. Hartman, 10 Ia. 589.

§§ 69, 70 Power and Jurisdiction of Grand Jury.

- § 69. Same subject—Classification of cases in which question arises.—The cases in which this question has arisen have been divided by the court in a Maryland case into three classes: First, those which hold that a court has no authority to try a person upon an indictment found by a grand jury composed of fewer numbers than the minimum number required by statute, and that objection upon this ground may be raised at any time, and in any manner, and cannot be waived by any act, or failure to act on the part of the defendant; second, those which hold that the objection is waived by failure to take advantage of the defect before pleading to the merits; and, third, those which hold that statutes fixing a number to compose a grand jury are directory merely, and do not alter the common law rule, by which any number between thirteen and twenty-three constitute a competent jury.<sup>36</sup>
- § 70. Same subject Application of general rule. In the application of the principle stated in the preceding sections it has been decided that an indictment found by a grand jury, which was drawn by virtue of venires not having the seal of the court upon them, is illegal and void, and that the defect cannot be cured either by an amendment or by a separate act of the Legislature.37 And in a case in Florida it is decided that where officers charged with sumoning venires for petit jurors from the body of the county discriminate against persons of color, solely on account of their color, in executing the venire, a colored person upon trial, charged with crime, may challenge the array of such petit jurors upon the ground stated, when it is proposed to select jurors to try him . from such special venire, but where the fact of such discrimination does not appear of record, the challenge must be sustained by proof, otherwise it is properly overruled.<sup>38</sup> And where a sheriff, who was required by statute to summon the persons selected as grand jurors, failed to summon one of those selected, but summoned another person in his place without an order of court

<sup>36.</sup> State v. Vincent, 91 Md. 728, 47 Atl. 1036, 52 L. R. A. 83.

<sup>37.</sup> State v. Flemming, 66 Me. 142, 22 Am. Rep. 557; State v. Light-

body, 38 Me. 200. But see Pierce v. State, 12 Tex. 210.

<sup>38.</sup> Tarrance v. State, 43 Fla. 447.

authorizing him to so act, it was held that an indictment found by the grand jury so constituted was properly quashed.<sup>39</sup> where it was provided by statute that certain judges of the courts in Baltimore, or any two of them forming a quorum, should meet to select a list of names of persons qualified to serve as grand jurors, it was decided that a grand jury was not properly organized where it appeared that the judges did not meet to make the selection, but that the list was prepared by one of the deputy clerks of one of the courts, who submitted it, seriatim and separately, to the different judges, who approved of and adopted it without con-And an indictment found by such a grand jury was So indictments found by a jury held to be null and void.40 summoned by a sheriff without process are held to be of no force and may be quashed on motion.41 And where the statute does not authorize the selection of members

39. State v. Cantrell, 21 Ark. 127. 40. Clare v. State, 30 Md. 165. Judge STUART said in this case: "There can be no doubt that the Legislature, in the enactment of this law, designed to avoid, if possible, vices then existing in regard to the organization of the juries for the city of Baltimore, and to accomplish a reform in that respect. The respective duties we have enumerated, were particularly enjoined upon the judges as possessing in the estimation of the Legislature, peculiar fitness for the trust. That from their official station as the ministers of justice, and from other superior intelligence and impartiality, they would be the very best instruments faithfully to carry into execution the provisions of the law. That they would, in person, make selection of upright, impartial and capable persons, to serve in the capacity of jury, in the administration of justice in civil and criminal cases. The Legislature expressly im-

posed this important duty upon the judges, and did not authorize them to depute their discharge to others. Not only was there no meeting for consultation, on the part of the judges, for the selection of names of persons to compose the list, but no meeting afterwards to approve or reject what had been done by the subordinate official. When presented to each judge separately, it was adopted without particular examination. We cannot give our sanction to such a mistaken execution of this law. Its chief provisions have been disregarded,-indeed, virtually abrogated. It follows from these fatal omissions, that the body of men assuming to act as a grand jury, and to find the indictment in this case, was not qualified to act as such, because the mandates of the law had not been pursued in their selection."

41. Nichols v. State, 5 N. J. L. 539.

of the grand jury, during term time, an indictment found by a grand jury, a part of whose members were so selected, will be regarded as void.<sup>42</sup> So where a judge informed the grand jurors that they need not appear at the next term, unless again summoned, it was decided that he was not authorized on the third day of the next term, without any summons or other notice to the jurors to appear, to impanel a grand jury by calling talesmen to take the place of such of the regular panel as were absent, and so an indictment found by such a grand jury should be quashed.<sup>43</sup>

§ 71. Grand jury must be legal body though indictment not required.— A provision of the State Constitution that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment by grand jury entitles one to an indictment by a grand jury, which is legally constituted. And this is true, though the offense with which a person is charged is a misdemeanor instead of a felony, for if the district attorney elects to prosecute a person on an indictment, it must be by one which is found by a legally organized grand jury. The fact that a prosecution by indictment is not required is immaterial.<sup>44</sup>

42. State v. Symons, 36 Me. 128. 43. State v. Bowman, 73 Ia. 110. Judge BECK said in this case: "No summons was issued to the jurors to appear at the term, or any day thereof, and no notice to that effect was given to them in any other way. The jury was impanelled on the third day of the term. It is not shown how many of the regular panel were present, or how many were put upon the jury. It appears that some two, at least, were absent on account of the direction of the judge for them. not to appear as above stated. The jury should not have been impanelled when jurors were absent, by direction of the judge, until they had been notified and failed to appear. The law does not authorize the judge to

control in this way the impanelling of the jury, and exclude persons therefrom chosen in the manner prescribed by law. We think the grand jury finding the indictment was illegally impanelled, and the motion to quash the indictment should have been sustained."

44. People v. Scannell, 37 Misc. 345, 75 N. Y. S. 500, 16 N. Y. Crim. Rep. 321. Judge Goff said in this case: "The defendants may be brought into court either by information or by indictment; but by whichever method, they must be legally charged with the commission of a crime. If by indictment, the pleading must be in the form of, and must contain the essentials prescribed by law, and if an indictment for misde-

§ 72. Objection to formation of grand jury—Right to make may be limited by statute.—In some States the right to make an objection to the formation of a grand jury is restricted by a statute. So in Alabama, under the code provision that "no objection can be taken to an indictment by a plea in abatement or on any ground owing to the formation of otherwise \* \* \* the grand jury, except that the jurors were not drawn in the presence of the officers designated by law," it is decided that it is the uniform ruling to disallow all defenses, excepting the one resting on the statutory ground. 45 So in Kansas, under a statute that no plea in abatement or other objection shall be taken to any grand jury, duly charged and sworn, for any alleged irregularity in their selection, unless such irregularity, in the opinion of the court, amount to corruption, in which case such plea, or objection shall be received, it is decided that although essential provisions of the statute as to the qualification of jurors may be disregarded, yet that such disregard is not a sufficient ground upon which to sustain a plea in abatement, unless it be shown that such disregard amounts to actual corruption.46

meanor be defective in form or substance, the fact that the Constitution did not require prosecution for misdemeanor by indictment, would not make good that which was bad. if an indictment for misdemeanor be found by an illegally constituted grand jury, it follows that it is not a legal pleading on which a prosecution can be instituted. There is but one grand jury, and that is the one referred to in the Constitution, and the formation of which is regulated by statute; and if a body of men be organized into a grand jury without authority of law, it would not be a legal grand jury, and any indictment found by it, whether for felony or misdemeanor, could not sustain a 'criminal prosecution. When, in a case of misdemeanor, a district attorney elects to prosecute by indictment, he must do so through the medium of a legally constituted grand jury, and by an indictment that is good at law, both as to form and substance. To admit a different contention would lead to a conclusion, impossible under our law, that for a misdemeanor a district attorney could prosecute by an insufficient indictment, found by an illegal grand jury."

45. Stoneking v. State, 118 Ala. 68, 24 So. 47; Murphy v. State, 86 Ala. 46; 5 So. 432; Cross v. State, 63 Ala. 40; Boulo v. State, 51 Ala. 18; Brooks v. State, 9 Ala. 9.

46. State v. Skinner, 34 Kan. 247. Holding that it was not a ground of objection that the names of some of the grand jurors were not found upon

#### § 73 Power and Jurisdiction of Grand Jury.

And in a case in Nevada, where defendant had not been held to answer before the finding of an indictment against him, and he moved to set it aside on the ground that no list of names selected as grand jurors for the session at which the indictment was found was certified by the officer making the selection, it was held that the motion was properly overruled, since the laws of that State, declaring the ground for a motion to set aside an indictment, where the defendant has not been held to answer before the finding of the same, include no such ground.<sup>47</sup>

§ 73. Constitutional provision requiring indictment—When construed with reference to common law as to number. - A constitutional provision that "No person shall be held to answer for a capital or otherwise infamous offense, \* \* \* presentment or indictment of a grand jury," is to be construed with reference to the common law and the statutes in force at the time of the adoption of the Constitution. Therefore in determining a question, as to the number of persons necessary to a legally organized grand jury, resort must be had to the common law, where there is no Constitution, or provision of the statute in force at the time designating the number necessary to the formation of the grand jury, or to the finding of an indictment.48 At common law a grand jury was composed of not less than twelve nor more than twenty-three persons, and it was essential to the finding of an indictment that there should be a concurrence of twelve of this number. This rule of the common law is one of the rights guaranteed and secured by a constitutional provision such as the above, and it has been determined that the Legislature has no power under such a provision to authorize the finding of an indictment by less than twelve persons. 49 In an early case in North

the assessment rolls of the previous years. Cited and approved in State v. Donaldson, 43 Kan. 431. E. 115, 10 L. R. A. 50.

49. English v. Florida, 31 Fla. 340, 12 So. 689; State v. Barker, 107 N. C. 913, 13 S. E. 115, 10 L. R. A. 50; see also Coffey v. Superior Court of Sacramento County, 2 Cal. App. 453, 83 Pac. 580; Brucker v. State, 16 Wis. 255.

**<sup>47.</sup>** State v. Simas, 25 Nev. 432, 62 Pac. 242, decided under Nev. Comp. Laws, §§ 4241, 4149, 4150.

**<sup>48.</sup>** State v. Hartley, 22 Nev. 342; State v. Barker, 107 N. C. 913, 13 S.

Carolina it is said, in the consideration of this question: "These great principles of the common law were brought over to this country by our ancestors, and, with an extension of their application to other offenses, were by the Constitution made a part of our fundamental law, and cannot be violated either by the judiciary or the Legislature."50 So in Florida it has been decided that a statute providing that a grand jury shall be composed of twelve persons, of whom the assent of eight shall be sufficient to the finding of an indictment while constitutional as to the number which shall compose a grand jury is void as to the number necessary to find an indictment, the concurrence of twelve being necessary, as at common law.51 And in North Carolina it has been decided that under such a provision of the Constitution it is not competent for the Legislature to provide that the concurrence of nine members of a grand jury shall be sufficient.<sup>52</sup> Again, where the statute directs that clerks shall issue writs of venire facias for twenty-three grand jurors, to be returned, but makes no provision relative to the number necessary to form a quorum, it is regarded as leaving that to the same rule of the common law, by which it was previously regulated. A provision of this character is merely directory to the clerks, in order that the actual attendance of a sufficient number may be better insured.53

§ 74. Where number of grand jurors specified by law—Compliance essential.—The court can acquire no jurisdiction in the case of an indictment except the grand jury finding it be organized in accordance with the law, and where an indictment has been found by a grand jury which is composed of a number other than that specified, no jurisdiction is conferred upon the court.<sup>54</sup>

<sup>50.</sup> State v. Davis, 2 Ired. L. (N. C.) 153, 158, per Gaston, J., quoted with approval in State v. Barker, 107 N. C. 913, 13 S. E. 115, 10 L. R. A. 50.

**<sup>51.</sup>** English v. State, 31 Fla. 340, 12 So. 689.

<sup>52.</sup> State v. Barker, 107 N. C. 913,

<sup>13</sup> S. E. 115, 10 L. R. A. 50.

<sup>53.</sup> Commonwealth v. Wood, 2 Cush. (Mass.) 149.

**<sup>54.</sup> Alabama.**—Berry v. State, 63 Ala. 126, 12 So. 689.

California.—People v. Thurston, 5 Cal. 69.

#### § 74 Power and Jurisdiction of Grand Jury.

The express provisions of the law as to the number which shall be necessary to constitute a grand jury, cannot be altered by the fact that a person may not raise objection until after he has been put upon his trial. A number specified by the law as necessary to constitute a grand jury, is essential to the validity of their acts, and a body which is composed of less than the number specified is not a grand jury, and an indictment found by it will be of no force.<sup>56</sup>

Iowa.—Norris' House v. State, 3 G. Greene, 513.

Michigan.—See People v. Thompson, 122 Mich. 411, 81 N. W. 344.

Texas.—Wells v. State, 21 Tex. App. 594, 2 S. W. 806; Williams v. State, 19 Tex. App. 265; Smith v. State, 19 Tex. App. 95; McNeese v. State, 19 Tex. App. 48; Lott v. State, 18 Tex. App. 627.

The statutes of the United States as to the number of persons who shall compose a grand jury do not apply to a prosecution for murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee nation. Talton v. Mayes, 163 U. S. 376, 16 S. Ct. 986.

55. Doyle v. State, 17 Ohio, 225. The court said in this case: person can be put upon his defense on the charge of crime, or be convicted of crime, except in the exact mode prescribed by law. And whenever it shall be made manifest. in the progress of a criminal prosecution that the legal rights of the person charged have been violated, the court will permit the accused to have the benefit of the error. It is said the prisoner might have exerted his right of challenge to the poll or the array. He might not know that he was charged with crime, or that a bill would be found. But apart from all this, the court have the power only to try a person who has been indicted for crime. What an indict is, is matter of law. What shall constitute a grand jury, how it shall be summoned, composed, and organized, is all matter of positive law. No man by express consent can confer jurisdiction upon the court, to try him for crime. No man by express consent, can make that an indictment, authorizing the court to try that which in fact was not an indictment. less could that be converted into an indictment, which in law was not, by implied consent, derived from waiver of plea. Suppose that a paper, in the form of an indictment should be put upon file, not purporting to be found by a grand jury, could the person charged, by entering a plea of not guilty, confer upon the court power to try and sentence him? No one would pretend it. Yet it is contended 'hat if you have the form and not the substance, that lack of vigilance or mistake to take advantage of it at the right moment, or in a wrong mode, will convert the shadow into a reality. This is neither true in reason or sound in law; and it is time in criminal prosecutions, that the whole cob-web of legal fiction and technical inference against the accused, should be stricken down. plea, in this case, is a complete

So where the Constitution of a State, or the statutes, provide that a grand jury shall be composed of a certain number of persons, an indictment found by a body composed of more than the number specified will be void, and in such a case the fact that a person may consent to trial under an indictment so found, will not operate as a bar to a subsequent prosecution under a valid indictment.<sup>56</sup> In Alabama it has been decided that in the organization of a grand jury, where the record discloses that the number drawn to serve on said jury was eighteen, and that only fifteen of said number appeared, and that by reason of an excuse allowed by the court, one other was not required to serve, reducing the number to fourteen, and thereupon the court ordered these persons to be summoned, and the record recited that three named persons "were elected to serve as grand jurors," it cannot be said that such grand jury was illegally organized.<sup>57</sup>

§ 75. Where one of grand jury excused but necessary number concur.—A constitutional provision that a grand jury shall be composed of twelve persons, but that nine members shall be a quorum to transact business and present bills, is held not to render invalid an indictment which was found by a grand jury

answer why the accused should not be put upon trial. It goes to the whole matter, that there is no indictment, there was no grand jury." Per READ, J. See also Smith v. State, 19 Tex. App. 95.

56. Ogle v. State, 43 Tex. Crim. 219, 63 S. W. 1009, 96 Am. St. Rep. 860. DAVIDSON, J., said in this case, after a review of the authorities: "Then, if these authorities are correct, and we hold they are, the jurisdiction of the District Court cannot attach in felony cases until there has been an indictment preferred by a grand jury. The Constitution expressly provides that a grand jury shall consist of twelve men, and having spoken thus emphatically its mandate must be

obeyed; and no other number of men than twelve can constitute a grand Therefore, the act of more than twelve men constituting a grand jury will be utterly void, and is not the basis of jurisdiction. jurisdiction the District Court cannot act in felony cases, any more than can the justice of the peace or the County Court." See also People v. Thurston, 5 Cal. 69; Wells v. State, 21 Tex. App. 594, 2 S. W. 806: Rainey v. State, 19 Tex. App. 479; Ex parte Swain, 19 Tex. App. 323; Williams v. State, 19 Tex. App. 265; Nicheese v. State, 19 Tex. App. 48; Lott v. State, 18 Tex. App. 627.

57. Hall v. State, 134 Ala. 90, 32 So. 750.

composed of twelve men at the time it was impanelled, but which was subsequently reduced to eleven, at the time the indictment was found, owing to the discharge of one of the members who had removed beyond the jurisdiction of the court and acquired a residence in another State.<sup>58</sup> And in Iowa, under a statute providing

58. Drake v. State, 25 Tex. App. 293, 7 S. W. 868. Judge Hurt said "The position asin this case: sumed by counsel for appellant is that, unless there was a grand jury composed of twelve men when the bill was presented, less than twelve were without authority to act, the constitutional body being dissolved; that, while it is true that nine members may constitute a quorum, etc., still there must be a body composed of twelve men in order to the existence of a legal grand jury. Grand juries shall be composed of twelve men, but nine members of a grand jury shall be a quorum to transact business and (Const., art. 5, § 13.) present bills. The Supreme Court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and the concurrence of two judges shall be necessary to the decision of a case. Two judges of the Supreme Court constitute a quorum, though the Constitution requires that the Supreme Court shall consist of a chief justice and two associates. Now, let us suppose that a member of theSupreme should die, evidently there would still be a constitutional court remaining, with full and complete powers to decide causes, powers and authority, equal to that possessed by a full bench. Applying that analogy, suppose three members of the grand jury should die, would not the remaining nine have all the powers and functions of a body composed of twelve men? Would it be necessary to render their acts legal, for the body, composed originally of twelve men, to remain unbroken? If so, why not apply this rule to the organization of the Supreme Court, and hold that less than three members would not constitute a court? We may be answered that the Constitution pressly provides that two members of the court shall be a quorum. To this we reply that the Constitution expressly declares that nine members of the grand jury shall be a quorum to transact business and present billsa quorum to do precisely that which is objected to by appellant, i. e., present bills. If, therefore, the death of a member of the Supreme Court will not affect its existence as a court, for the same reason the death of a member of the grand jury will not dissolve the grand jury and render the acts of a quorum nugatory. If, howthe Legislature should, violation of the Constitution, place upon the Supreme bench more than three members, the courts of the country would not hesitate to declare such an organization absolutely void -no court at all. So with the organization of a grand jury. statute it is made the duty of the judge to impanel twelve men. (Code Crim. Proc., arts. 368, 371, 376, 384, 391.) Twelve constituting the panel, that a grand jury shall be composed of not less than five persons, and that the concurrence of four only shall be necessary to the finding of an indictment, it has been decided that though one of the required five is excused by challenge, an indictment found by the four remaining members, who concur therein, will be sufficient.<sup>59</sup>

§ 76. Defects in organization or selection of grand jury which are immaterial.—Mere technical defects or errors, in regard to the selection, drawing or organization of the grand jury, and which do not affect the substantial rights of the accused, will not operate to invalidate or defeat an indictment.<sup>60</sup> And an indictment will not necessarily be void because there has been a failure to comply with the law in the selection or impanelling of a grand jury,<sup>61</sup> or by an irregularity in the drawing of one of the names.<sup>62</sup>

It is said in this connection that the validity of an indictment is not affected by the manner in which jurors may be drawn, provided they possess the qualifications prescribed by law, and

twelve should be impanelled; but from this it does not follow that there must be twelve jurors subject for duty or within the jurisdiction of the court all the while. The object of the provision of the Constitution making nine a quorum was evidently intended to meet any and all contingencies of like character as that presented in this case, or the death of a member. There was no error in refusing to quash the indictment." This decision was approved and followed in Jackson v. State, 25 Tex. App. 314, 7 S. W. 872.

59. State v. Billings, 77 Iowa, 417,42 N. W. 456. See People v. Butler,8 Cal. 435.

Such a statute does not violate a constitutional provision that a grand jury shall be composed of not less than five nor more than fifteen persons. State v. Salts, 77 Iowa, 193, 39 N. W. 167, construing Iowa Acts 1886, c. 42, § 21, and Const., art. 1, § 11, and Amend. 3.

60. State v. Brandt. 41 Iowa, 593.

61. State v. Heusley, 7 Blackf. (Ind.) 324; State v. Bolt, 7 Blackf. (Ind.) 19. See State v. Gee, 104 La. 247, 28 So. 879, holding that a failure to advertise the name of one

of the members of a grand jury did not constitute sufficient ground for quashing an indictment where it appeared that the names of the twelve members of the grand jury finding the indictment were duly advertised.

62. Commonwealth v. Brown, 147 Mass. 585, 18 N. E. 587, 1 L. R. A. 620, so holding where it appeared that the name of a person, who had been drawn as a grand juror, had been left in the box after a vote of the town directing that it be struck from the list of grand jurors which had been prepared.

#### § 77 POWER AND JURISDICTION OF GRAND JURY.

that the true rule seems to be that an indictment found by a grand jury, one or more of whose members were irregularly drawn, but who possess the requisite qualifications is valid, and the proceedings by which a juror goes on the panel do not affect the validity of the indictment.<sup>63</sup> So it is declared in a case in Maryland, that the authorities show that although there be irregularities in the selection and drawing of a jury, the proceedings will not be set aside unless the court can see that they have resulted or may result to the prejudice of the party accused.<sup>64</sup>

§ 77. Same subject—Illustration of rule.— The fact that the list from which the names of grand jurors are to be selected does not contain as many names as is required by statute is held to be no ground for quashing an indictment found by a grand jury which was drawn from such list.65 And where a judge permitted two more persons to be sworn as grand jurors than was authorized by statute but subsequently discharged the two last sworn in before any action had been taken, it was held that the action of the judge in permitting such persons to be sworn was no ground for quashing an indictment which was afterwards found by those remaining and permitted to act as grand jurors.66 And the fact that the court directed twenty-four men summoned as grand jurors to retire to the grand jury room and to excuse the last man on the list, and then to organize by electing a foreman and that the twenty-three return with the foreman to be sworn, which was done, does not vitiate an indictment found by such grand jury after it had been organized and sworn, as the grand jury is

63. State v. Cambron (S. D. 1905), 105 N. W. 241, citing Commonwealth v. Brown, 147 Mass, 585, 18 N. E. 587, 1 L. R. A. 620, 9 Am. St. Rep. 736; Carpenter v. People, 64 N. Y. 483; Ferris v. People, 35 N. Y. 125; Wilhelm v. People, 72 Ill. 468; Rolland v. Commonwealth, 82 Pa. St. 306, 22 Am. Rep. 758; People v. Ah Chung, 54 Cal. 398; Cox v. People, 80 N. Y. 500; State v. Copp, 34 Kan. 522, 9 Pac. 232; Common-

wealth v. Walsh, 124 Mass. 32; People v. Houghkerk, 96 N. Y. 149; Commonwealth v. Moran, 130 Mass. 281; In re Wilson, 140 U. S. 585, 11 Sup. Ct. 870, 35 L. Ed. 513; People v. Lauder, 82 Mich. 109, 46 N. W. 956.

**64.** State v. Keating, 85 Md. 188, 36 Atl. 840.

**65.** People v. Harriot, 3 Park. Cr. (N. Y.) 112.

66. State v. Fee, 19 Wis. 562.

not complete and ready to transact business until it has been sworn.<sup>67</sup>

Nor will it be a good objection to an indictment that before it was found and after the impanelling of the grand jury two of the grand jurors were, upon application, discharged that they might attend to their private business, and that others were chosen to act in their place.<sup>68</sup> And where a grand juror, who was qualified to act, was withdrawn by the direction of the district attorney in good faith but without authority, it was decided that the indictment was not thereby vitiated, it appearing that it was subsequently returned to the grand jury and that upon a vote by them, including the member who had been excluded, the bill was returned. 69 Again, in a case in New York, it was decided that a plea in abatement to an indictment found at a court of General Sessions, in the city of New York, alleging that the annual grand jury list was not wholly selected, as required by statute, from the petit jury lists made out by the commissioner of jurors, without any averments of fraud or design, is not good. It was decided that the fact that a few names not appearing on the petit jury lists are accidentally put upon the grand jury list, does not vitiate the whole list, and that it was by accident or oversight is to be presumed, in the absence of allegations of fraud and design. 70 And the fact that the list of grand jurors has not been formally authenticated, as required by a statute, has been held not to be a sufficient ground for setting aside an indictment, there being no evidence of fraud.<sup>71</sup> Again, the fact that a person who was drawn as a grand juror without proper notice was present at the time an indictment was found will not invalidate the indictment where such person did not act.<sup>72</sup> Nor will the fact that one of the grand jurors who has been challenged and excluded from the delibera-

<sup>67.</sup> Ridling v. State, 56 Ga. 601.

<sup>68.</sup> Denning v. State, 22 Ark. 131.

<sup>69.</sup> Commonwealth v. Bradney,
126 Pa. St. 199, 17 Atl. 600, 24 W.
N. C. 101, 17 Wash. L. R. 618, 20
Pitts. L. J. N. S. 63.

**<sup>70.</sup>** Dolan v. People, 64 N. Y. 485, decided under chap. 498, Laws of 1853.

<sup>71.</sup> State v. Ansaleme, 15 Iowa,

<sup>72.</sup> State v. Clough, 49 Me. 573.

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tions of the case is present in court with the other grand jurors when the indictment is presented vitiate the indictment.<sup>73</sup>

- § 78. Where person drawn as grand juror is personated by another.—Where a person who is regularly drawn by the proper officers, as a member of the grand jury, is falsely personated by another person who has the same surname, and the latter is sworn and acts as a member of the grand jury, in place of the one who was drawn, his conduct will be fatal to the organization of the grand jury, and a good plea to an indictment found by it.<sup>74</sup>
- § 79. Court cannot remove or change members of grand jury.—Where the selection and impanelling of a grand jury is a matter regulated by statute, and no power is conferred upon the prosecutor to challenge the panel or individual members of the jury, or upon the court to select or create, the court cannot, as an incident to jurisdiction, remove, reform or change the members of the grand jury. So it is said in a recent case in which this question is considered: "The selection and impanelling of grand jurors are matters of statutory regulation. The code confers no authority upon the prosecutor to challenge the panel or individual members of the grand jury, and as the court has not the

73. People v. Gatewood, 20 Cal. 146.

74. Nixon v. State, 68 Ala. 535. The court declared in this case: "It is impossible to estimate, and equally impracticable to speculate upon the influence exerted upon the deliberations of such a body by one bold, bad man, who corruptly insinuates himself into their secret counsels, unrestrained by the safeguard of adjudged qualifications. He may, possibly, have no other purpose in view than the premeditated violation of the duties imposed by a grand juror's oath, which are to keep secret the State's counsel, his fellows' and his

own, and to present no person from envy, hatred or malice, nor leave any one unpresented from fear, affection, reward, or the hope thereof. § 4755.) If we can permit the false personation of one grand juror, the same rule of justification must, of necessity, apply to any greater number. There can be no rule of limitation, in such an important matter, which can stand the test of logical soundness, short of total exclusion. We think the facts set up in the plea in abatement and the motion to quash, if true, entirely vitiate the indictments." Per Somerville, J.

power to select or create, neither has it the power as an incident to jurisdiction, to remove, reform, or change the members of the jury. If by virtue of this incident to jurisdiction the court has the discretionary power to reform the jury for one purpose, it may for another, and if four, then may more, or all of the jurors be changed, and thus the obvious policy of the law to constitute and preserve that body independent of control and influence from the court, would be thwarted. Although the jurisdiction of the grand jury is co-extensive with that of the court, for which they are to inquire, both as to extent of territory, and the offenses to be investigated, and although they are sworn and charged by the court, still in their presentments they should act as a distinct and separate body, free from any fear, favor or affection resulting from the court or any other influence. If the court has the power to create, or change them at pleasure, or upon an expartemery affidavit, they might soon become the subjects of fear and favor, or of prejudice and popular caprice; the wholesome safeguards of the law for their selections rendered abortive, and the stability and independence of the panel greatly impaired." 75

§ 80. Grand jury should be sworn.—It is essential to the proper organization of a grand jury, that they be sworn.<sup>76</sup> And it has been said that every presumption is in favor of the correctness of the action of the court in the swearing of a grand jury, until the contrary is made to appear.<sup>77</sup> But it should appear by the record that the grand jury was sworn, and the omission to show such fact cannot be supplied by a recital in the indictment that it was sworn.<sup>78</sup> An objection, however, to the formation of the grand jury, that the foreman was not sworn, will not be sustained where there is a recital in the records, that "The grand jurors aforesaid were duly sworn and charged by the court."<sup>79</sup>

See, also, State v. Loving, 16 Tex. 558, holding that where the record recites that the foreman and grand jurors "were duly sworn as the law prescribes" it is error to sustain a motion quashing the indictment on the ground that it did not appear

<sup>75.</sup> Keitler v. State, 4 G. Greene (Iowa), 292. Per Greene, J.

**<sup>76.</sup>** Riddling v. State, 56 Ga. 601.

<sup>77.</sup> Allen v. People, 77 Ill. 484.

<sup>78.</sup> Abram v. State, 25 Miss. 589.

**<sup>79.</sup>** Bruen v. People, 206 Ill. 417, 69 N. E. 24.

It has further been decided in this connection that any officer that is authorized by law to administer oaths generally, may, under the direction of the court, lawfully administer the prescribed oath to a grand jury, and so it is not essential that the grand jury should be sworn by the clerk or the deputy clerk of the court, provided, of course, the statute does not so require.80

Again, though a grand jury may be excused from taking an oath, yet if an indictment purports to be on the affirmation of a grand jury, it has been declared that it must appear that they alleged themselves conscientiously scrupulous of taking oath.81

§ 81. Grand jury must be composed of persons qualified to act. —One of the essentials to a valid indictment is that it must be found by grand jurors, who are qualified to serve, and if it appears that one or more of the grand jurors who have found an indictment were disqualified, the indictment so found will be vitiated if the objection thereto is made in due time.82 It will.

that the oath prescribed for the foreman was taken by him. In such a case the presumption arises that the proper oath was administered.

80. Allen v. People, 77 Ill. 484.

81. State v. Fox, 9 N. J. L. 244, holding that in the case of an indictment which purports to be on the affirmation of some of the members of the grand jury it should appear that they were legally entitled to serve on their affirmation. State v. Harris, 7 N. J. L. 361.

82. United States.—Crowley v. United States, 194 U.S. 461, 24 S. Ct. 731, 48 L. Ed. 1075; United States v. Jones, 31 Fed. 725.

Florida.—Kitrol v. State, 9 Fla. 9. Georgia.—Reich v. State, 53 Ga. 73.

Indiana.-State v. Herndon, 5 Blackf. 75.

Maine.—State v. Symonds, 36 Me. 128.

New Jersey .- State v. Rockafellow, 6 N. J. L. 332.

North Carolina.-State v. Durham Fertilizer Co., 111 N. C. 658, 16 S. E. 231.

Texas.—Martin v. State, 22 Tex. 214; State v. Foster, 9 Tex. 65.

Wisconsin.-State v. Cole, Wis. 674.

Rule in Federal courts as to qualification .- "In matters which relate to the qualifications and exemptions of jurors, the Federal court must be governed by the laws of the States in which such courts are held. In designating, summoning, forming, and impanelling juries, the Federal courts have a large discretion, and may by rules or order adopt the State methods and usages so far as practicable, as a strict conformity with State laws is not required. no statute expressly requiring Federal courts to conform their practice, however, be presumed, until the contrary appears, that persons summoned by the sheriff, who served as grand jurors, were duly qualified and were selected from the body of the county

pleading and modes of procedure, in criminal trials, to the laws of the State in which they are held." United States v. Kilpatrick, 16 Fed. 767, per DICK, J.

As to the time and manner of raising the objection, it is said in a case in Texas, which is referred to by the United States Supreme Court, in Crowley v. United States, 194 U. S. 461, 472, 24 S. 731, as a leading case upon this question, that "The better inforto mation be deduced from authorities, to which we have access, seems to be, that irregularities, in selecting and impanelling the grand jury, which do not relate to the competency of individual jurors, can in general only be objected to by a challenge to the array. But that the incompetency or want of the requisite qualifications of the jurors may be pleaded in abatement to the indict-And this doctrine and distinction seems founded on principle. is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment. It is his right, in the first place, to have the accusation passed upon, before he can be called upon to answer to the charge of crime, by a grand jury, composed of good and lawful men. If the jury be not composed of such men as possess the requisite qualifications, he ought not be put upon his trial upon a charge preferred by them; but should be permitted to plead their incompetency to prefer the charge and put him upon his trial, in avoidance of the indictment. Otherwise, he may be compelled to answer to a criminal charge preferred by men who are infamous, or unworthy to be his accusers. may be that he will not have an opportunity afforded to question their competency before the finding of the For the accused is not indictment. supposed to be present when the grand jurors are impanelled; he may not have been the subject or complaint or of suspicion; and if he could not plead to the indictment, in such a case, the incompetency of his accusers, the right to have the accusation preferred by good and lawful men might be virtually denied him. It is for the purpose, therefore, of securing to the accused a substantial right, affecting, it may be, his character and good name, if not his personal security, so that he is allowed to plead in abatement or in avoidance of the charge, the incompetency of the persons by whom it was pre-But if the jurors who preferred the charge are good and lawful men; unexceptionable as respects qualifications, it can be of no consequence to the accused in what manner they were selected, or how impanelled, while it may be of the utmost consequence to the public that the administration of justice be not delayed or defeated by mere technical objections to the regularity of the proceedings, of those who are ap-

as required by law.83 Again, unless the want of qualification of a grand juror is apparent on the face of the indictment, or upon the record, it is decided that it cannot be taken advantage of by a motion to quash, but that it must be pleaded in abatement.84 And where it is provided by law that where a defendant has not been held to answer before the finding of an indictment against him, he may move to set it aside on any good ground for challenge either to the panel or to any individual grand juror, it has been decided that, where a defendant had not been held to answer before the finding of an indictment, and he moved to set it aside on the ground that the several members of the grand jury were not shown to be qualified grand jurors, the motion was properly overruled where the ground of the motion was not a statutory ground of challenge to an individual grand juror within the provisions of the statute setting forth the grounds for challenge.85

§ 82. Waiver of objection to want of qualification. — A person who is accused of an offense, and who is aware of the disqualifications of some juror or jurors, and who fails to make objection to their serving, will be regarded as having waived his right to object thereto, and will be estopped from demanding as a matter of right a new trial on the ground of such disqualification. 86

pointed for the purpose of properly distributing and equalizing the burden of the jury service. It is in these considerations which have respect to the rights of the citizen on one hand, and public convenience on the other, that the rules of the law on these subjects are founded." Vanhook v. State, 12 Tex. 268.

83. Bruen v. People, 206 Ill. 417,69 N. E. 24; Thayer v. People, 2Dougl. (Mich.) 417.

84. State v. Foster, 9 Tex. 65.

85. State v. Simas, 25 Nev. 432, 62 Pac. 242, decided under Nev. Comp. Laws, §§ 4241, 4150.

86. State v. Hartley, 22 Nev. 342. Judge Bonnifield, in a review of the decisions, said, in conclusion: is, therefore, evident from the great weight of the authorities, and from the statute and common law, that a defendant can waive his objections to the qualifications of jurors, and if he fail to challenge before the jury is completed, knowing of the disqualification, he is estopped from demanding, as a matter of right, a new trial on the ground that the jury were not omni exceptione majores, and that, in contemplation of the Constitution, he has not, in such case, after verdict,

§ 83. Grand jurors must be qualified—Rule illustrated.—An indictment may be rendered void by the fact that one serving upon the grand jury is not a citizen of the United States,87 or that one of the members of the jury is not a freeholder or a householder in the county,88 or that one selected as a juror has not paid his taxes for the preceding year,89 or that one of the members of the grand jury, by which the indictment was returned, had previously served on a jury by which a verdict of guilty against the prisoner for the same offense had been rendered.90 where the statute provides that persons between the ages of twenty-one and sixty are hereby made competent jurors, it is essential to the proper organization of a grand jury, that the persons should possess the qualifications prescribed, and one who is over sixty years of age is not a competent grand juror. 91 The mere fact, however, that a juror otherwise qualified, was selected by the court from the bystanders, instead of a juror from the venire, is held to be no ground for abating an indictment, found by him and twelve other grand jurors, taken from the venire,

constitutional ground for the objection that he has not been triel by a constitutional jury."

87. State v. Cole, 17 Wis. 674.

Where a statute or code clearly contemplates that a grand juryman must be a citizen, it will be a good plea to an indictment if made on arraignment that one of the grand jurors is an alien, and not qualified to sit as a grand juror. Reich v. State, 53 Ga. 73.

88. State v. Rockafellow, 6 N. J. L. 332; Martin v. State, 22 Tex. 214; Commonwealth v. St. Clair, Gratt (Va.), 556.

89. State v. Durham Fertilizer Co., 111 N. C. 658, 16 S. E. 231.

90. United States v. Jones, 31 Fed. 725.

91. Kitrol v. State, 9 Fla. 9. The

"Did the statute end court said: where it says, 'shall be liable to serve,' then we might with propriety say the statute leaves it a question of privilege with the juror, but the statute goes further, it declares that such persons are competent jurors, It follows that if such persons are competent, others not possessed of such qualifications are not compe-It was evidently the intention of the Legislature to secure for the protection of the citizen, whose rights might be affected, a grand jury composed of members possessing certain qualifications defined by the law. In giving this statute such a construction, we carry out that intention. We are, therefore, of the opinion that a person over 60 years of age is not, under the statute, a competent juror." Per FORWARD, J.

where an indictment may be validly found by such number.92 And it has been decided that the fact that one of the grand jurors who present a bill of indictment against a town for not making and opening a road is, at the time, a ratable inhabitant of such town, and therefore interested in the subject matter of it, is no cause why such indictment should be quashed, for if interested his interest would be to shield the town, and would therefore operate in its favor.93 So it has also been determined that the fact that a foreman of a grand jury which found an indictment for an offense punishable with a fine to be paid to the town, was a taxable inhabitant of the town is no defense to the indictment, 94 nor is an indictment vitiated by the fact that when it was presented one of the grand jurors was domiciled in another State, and therefore beyond the jurisdiction of the court.95 where a statute provides that if a person drawn as a grand juror, is exempt by law, or is unable, by reason or sickness or absence from home to attend as a juror, his name is to be returned to the box, and another drawn instead, this necessarily implies that the decision is to be made on the spot, and that such decision is final. And where, under such a statute, the name of a person was drawn, and the Board of Aldermen, upon whom devolved the duty specified in the statute, selected another name in the place of that of a person originally drawn and who was said, by a member of the board, to have removed from the town, it was held that the decision of the aldermen, if honestly made, was final, though it may have been wrong.96

§ 84. That a person is exempt from service as grand juror does not disqualify.—The fact that certain officers of the State are declared to be exempt from jury service does not disqualify them from acting as members of a grand jury. A privilege given them by such a statute is a personal one, and may be waived

**<sup>92.</sup>** Epperson v. State, 5 Lea (Tenn.), 291.

<sup>93.</sup> State v. Newfane, 12 Vt. 422.

<sup>94.</sup> Commonwealth v. Ryan, 5 Mass. 90.

<sup>95.</sup> Drake v. State, 25 Tex. App. 293, 7 S. W. 868, approved and followed in Jackson v. State, 25 Tex. App. 314, 7 S. W. 872.

<sup>96.</sup> Commonwealth v. Krathofski, 171 Mass. 450, 50 N. E. 1040.

by them at their pleasure. Therefore an indictment found by a grand jury, some of whose members are exempt from serving, under the laws of the State, will not affect the validity of the indictment.<sup>97</sup>

§ 85. Expression of opinion by grand juror as ground of objection.—It may be stated as a general rule that an objection that a grand juror was not qualified to act by reason of the fact that he had expressed an opinion as to the guilt of the accused should be raised before the juror is sworn, or at least before the indictment is found, and that after an indictment has been found it cannot be objected to on this ground.98 So it is said in a case in Connecticut, in which the decisions are reviewed: have examined, with considerable care, the authorities bearing upon this question, but find it nowhere laid down that the expression of an opinion by a grand juror, before he was summoned or returned and sworn, that the defendant was guilty, was ever a ground of challenge in the English courts. But in this country there are some respectable authorities in favor of allowing it to be a sufficient ground of challenge; whilst other authorities, equally respectable, hold the contrary. Nearly all the authorities of the former class, however, hold that the exception must be taken before the juror is sworn, and if taken afterward, it cannot be allowed." 99 And it is said in a case in Georgia:

**97.** Owens v. State, 25 Tex. App. 552. See, also, State v. Wright, 53 Me. 328.

98. Connecticut.—State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

Georgia.—Lee v. State, 69 Ga. 705.

Illinois.—Musick v. People, 40 Ill. 268.

Massachusetts.—Commonwealth v. Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. R. 302.

Nebraska.—Patrick v. State, 16 Neb. 330, 20 N. W. 121. New Jersey.—State v. Rickey, 10 N. J. L. 83.

New York.—People v. Jewett, 3 Wend. 314. Compare, State v. Clarissa, 11 Ala. 57; State v. Hughes, 1 Ala. 658; People v. District Court, 29 Colo. 83, 66 Pac. 1068.

It is held to be no ground of challenge in some cases. State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54; Musick v. People, 40 Ill. 268; State v. Rickey, 10 N. J. L. 83.

99. State v. Hamlin, 47 Conn. 95, 36 Am. St. Rep. 54, per Hovey, J.

presume it rarely occurs that a crime, especially of great magnitude, does not elicit an expression of opinion from that class of citizens who make up the grand jury; to allow this expression to disqualify and vacate an indictment would entail endless delay and embarrassment in the prosecution of crime, and too often secure immunity to the criminal." And where a statute or code specifies the ground on which a motion to set aside an indictment may be based, the grounds so specified are held to be exclusive of others. And it is decided in such a case that a motion of this character cannot be founded on the fact that a member of the grand jury finding an indictment had previously formed and expressed an unqualified opinion of the defendant's guilt, this not being one of the grounds enumerated.<sup>2</sup>

§ 86. Same subject—Application of rule.—The fact that a grand juror had formed an opinion as to the guilt of an accused person from testimony given by the latter before the grand jury upon its inquiry into another offense has been held not to affect his competency.<sup>3</sup> And in an early case in New York it was decided

- 1. Betts v. State, 66 Ga. 508, 515, per Speer, J.
- 2. State v. Baughman, 111 Iowa, 71, 82 N. W. 452.
- 3. People v. Northey, 77 Cal. 618, 19 Pac. 865. The court said in this case: "Now conceding that an indictment can be vitiated by the participation of a grand juror in finding it, who had formed, before entering on its examination, an unqualified, fixed and decided opinion that the defendant so indicted was guilty, and for that reason should be set aside, can it be that an opinion formed under the circumstances in evidence herein is of that character? facts upon which the opinion of each grand juror was formed herein came to his knowledge in the discharge of his duty as a grand juror, when the

grand jury was engaged in the discharge of its official duties, in inquiring into a public offense against the people of the State, triable within the county of their impeachment. Northey is called as a witness before them and testifies under oath in the presence of the jury to facts which inculpate him in a public offense within the scope of their inquiry. \* \* \* Can such an opinion -is it possible that an opinion so formed can be disqualifying as to any member of the grand jury to act upon an indictment of the witness for the offense of which he admits his guitt? The opinion which disqualifies is one formed from something heard outside, which has none of the sanction of an oath and is merely hearsay." Per Thornton, J.

that while it was a good cause of exception to a grand juror that he has formed and expressed an opinion as to the guilt of the party where the case probably will be presented to the consideration of the grand jury, such exception must be taken before the indictment is found, and will not be heard afterwards.4 So it has been decided that it is not a good plea in abatement to an indictment, that one of the grand jurors who found it had previously been a member of the coroner's jury, and found that the deceased had come to his death at the hands of the defendant and that the killing was murder.<sup>5</sup> And in a case in Tennessee it was decided that it was not a good plea in abatement that the foreman of a grand jury by which the indictment was found was one of the committing magistrates.<sup>6</sup> But in a case in the United States Circuit Court it is decided that an indictment should be dismissed where it appears by a plea in abatement that one of the grand jury who found the indictment was a member of a special jury which at a previous term returned a verdict of guilty against the prisoner for the same offense, which verdict has since been set aside.<sup>7</sup>

- § 87. Inquisitorial powers of grand jury.—It is said in an early case in Missouri that it is the duty of the grand jury to inquire diligently of all offenses against the law and that they may interrogate witnesses in a general way without an indictment having been drawn up charging some particular person or persons with crime.<sup>8</sup> And in a case in North Carolina it is de-
- 4. People v. Jewett, 3 Wend. (N. Y.) 314. The objection urged in this case was that the foreman of the grand jury had published a pamphlet in regard to the defendant which concluded with strictures on the latter's conduct, showing the estimation in which the juror held the defendant on the subject of the charge against him.
  - 5. Betts v. State, 66 Ga. 508.
- 6. State v. Chairs, 9 Baxt. (Tenn.) 196. The court said: "We do not understand that our laws re-

quire that the grand jurors shall be free from any previous opinion, as to the guilt of the accused." Per Mc-FARLAND, J. See also United States v. Belvin, 46 Fed. 381.

7. United States v. Jones, 31 Fed. 725.

8. Ward v. State, 2 Mo. 120, 22 Am. Dec. 449. But see State v. Wilcox, 104 N. C. 847, 10 S. E. 453, holding that the members of the grand jury have no right to summon witnesses to appear before them except by the permission of their fore-

clared that: "There can be no question about the fact that, at common law, a grand jury was charged especially with inquisitorial duties, and where there is probable cause to suspect that the law had been violated, they were considered bound by their oaths to institute inquiry and investigation. They had originally 'the right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses.'" And the fact that magistrates are required by statute to hold preliminary examination in cases beyond their jurisdiction does not oust the grand jury of their ancient right to investigate matters within the county.10 But is the duty of the grand jury to investigate criminal offenses, they do not possess power to summon witnesses before them for the purpose of ascertaining whether there has been any violation of the law, where no specific violation of any law is known. The grand jury cannot, for the purpose of finding an indictment, summon persons before them to give their general knowledge of the violation of the penal laws when the fact to be investigated has not been discovered by the grand jury or any member thereof and when that body knows nothing of the person connected with or guilty of the offense. In this connection it is said in a case in Georgia: "It is true that each member of the grand jury is under a solemn obligation to make diligent inquiry and to present truly all infractions of the criminal law, which may be given the body in charge, or may come to the knowledge of any of them touching the service in which they are engaged. That the powers of the body are inquisitorial to a certain extent is undeniable; yet they have to be exercised within well defined limits. Anything they can find out by their own inquiry and observation is legitimate and praiseworthy, but they have no authority to force private persons or the officers of the courts to disclose to them who may have violated the public laws, and the names of persons by whom such infractions can be established; -in short, to make every man a spy upon the

man, or of the solicitor as prescribed by the Code, § 743.

<sup>9.</sup> State v. Wilcox, 104 N. C. 847,

<sup>10</sup> S. E. 453, per AVERY, J., citing Wharton on Cr. Law, § 457, note h. 10. State v. Brown, 62 S. C. 374.

conduct of his neighbors and associates, and compel him to violate the confidence implied in holding social intercourse with his fellows by forcing him to become a public informer. Such an exercise of power would be in derogation of general principles essential to the enjoyment of rights regarded as sacred and paramount in the intercourse between man and man; and these rights have been carefully guarded; not only by the spirit of our law, but by its express enactments."

11. In re Lester, 77 Ga. 143, 147, per HALL, J.

"As the grand jury is an informing and accusing body, which makes its investigations and holds its deliberations in secret, and is irresponsible for its official action, upon matters of fact, except before the tribunal of public opinion, it is very important that its powers, duties and methods of procedure should be well understood, and be strictly confined within conservative and salutary limits, imposed by law, which experience has shown to be necessary to subserve the public good, and to accomplish a just and impartial administration of the criminal law.

In State courts, where common law jurisdiction over offenses is exercised, the powers and duties of grand juries are more extensive and responsible than in Federal courts, which have cognizance only of offenses defined and declared by acts of Congress; and there are special officers and agents appointed to make preliminary investigations fenses against national laws. grand juries have a general supervision over the peace, good order, and well-being of society, and may make presentments of offenses which are within their own personal knowledge and observation, or such as are of public notoriety, and injurious to the entire community, but they cannot make inquisitions into the general conduct and private business of their fellow-citizens and hunt up offenses by sending for witnesses to investigate vague accusations, founded upon suspicions and definite rumors. The repose of society, as well as the nature of our free institutions, forbid such a dangerous mode of inquisition." United States v. Kilpatrick, 16 Fed. 768, per DICK, J.

"The English practice which requires a preliminary investigation, where the accused can confront the accusers and witnesses with testimony, and have counsel, is more consonant to justice and the principles of personal liberty. The powers of the grand jury, therefore, should not be extended farther beyond these conservative and salutary principles. than is clearly warranted by public necessity and the most approved precedents. A prosecuting officer has no right, of his own motion, or upon that of an officious, if not an intermeddling and malicious prosecutor, to send witnesses to the grand jury room, merely to be interrogated whether there has been any violation

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In Pennsylvania it has been declared that, though it is held in the Federal courts and in some of the States, that the grand jury alone may call witnesses and institute all prosecutions of their own motion and without the aid of the district attorney, the power of the grand jury in that State is more restricted, and the better opinion is that they can act only upon and present offenses of public notoriety, and such as are within their own knowledge: such as are given to them in charge by the court and such as are sent up to them by the district attorney; and that in no other cases can they indict without a previous prosecution before a magistrate, according to the terms of the Bill of Rights.12 In Tennessee it has been decided that the grand jury has no inquisitorial power with reference to the offense of engaging in a riot, such offense not having been named in any of the statutes conferring that power upon the grand jury.13

§ 88. Preliminary examination or hearing not generally necessary.—It is a general rule that a grand jury has full power to find an indictment against a person though there has been no preliminary hearing or examination before a magistrate, provided, of course, that such hearing or examination is not,

of the criminal law, within their knowledge. The law denounces such inquisitorial powers, which may be carried to the extent of penetrating every household, and exposing the domestic privacy of every family. The repose of society, as well as the nature of our free institutions, forbid such a dangerous mode of inquisition. While the grand jury may thus proceed in prosecutions instituted by themselves, upon their own knowledge and observation, private individuals who may desire to prosecute offenders, have the right to inform the solicitor and have him to frame a bill of indictment against

the accused, indorsing upon it the name of the prosecutor, as such, with such other witnesses as he may desire, and send the bill with the witnesses to the grand jury." Lewis v. Board of Commissioners of Wake Co., 74 N. C. 197, per BYNUM, J.

12. McCullough v. Commonwealth, 67 Pa. St. 30; see also Commonwealth v. Grece, 126 Pa. St. 531, 17 Atl. 878; Rowan v. Commonwealth, 82 Pa. St. 405; Commonwealth v. Morse, 24 Pa. Co. Ct. 221.

13. State v. Lewis, 87 Tenn. 119, 9 S. W. 427; State v. Lee, 87 Tenn. 114.

either by a constitutional or statutory provision, made a prerequisite to the right of the grand jury to so act.<sup>14</sup>

So in Maryland it has been decided that in this State grand juries have plenary inquisitorial powers, and may lawfully themselves, and upon their own motion, originate charges against offenders, though no preliminary proceedings have been had before a magistrate, and though neither the court nor the States attorney has laid the matter before them. 15 The court said in this case: "That grand juries may on their own motion institute all prosecutions whatever is a view which was generally accepted at the institution of the Federal government, and was in accordance with the English practice then obtaining. The peace, the government and the dignity of the State, the well-being of society and the security of the individual demand that this ancient and important attribute of a grand jury should not be narrowed or interfered with when legitimately exerted. That it may, in some circumstances, be abused is no sufficient reason for denying its Though far-reaching and seemingly arbitrary, this power is at all times subordinate to the law, and experience has taught that it is one of the best means to preserve the good order of the commonwealth and to bring the guilty to punishment." 16 And it is also decided that though there may be a law in force, at the time the offense is committed, requiring that the accused be sent before a justice for an examination, if a law is subsequently passed, which omits such requirement, and the accused is indicted after it is passed, a preliminary examination need not be had.<sup>17</sup> And the right of a grand jury to find an indictment

14. California.—People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

Idaho.—State v. Schieler, 4 Ida. 120, 37 Pac. 272.

Louisiana.—State v. Bunger, 14 La. Ann. 461.

New Hampshire.—State v. Webster, 39 N. H. 96.

New York.—People v. McCarthy, 168 N. Y. 549, 61 N. E. 899; People v. Diamond, 72 App. Div. 281, 76 N. Y. Supp. 57; French v. People, 3 Park. Cr. R. 114.

**Pennsylvania.**—Commonwealth v. Taylor, 12 Pa. Co. Ct. R. 326.

West Virginia.—State v. Mooney, 49 W. Va. 712, 39 S. E. 657.

15. Blaney v. State, 74 Md. 153, 21 Atl. 547.

16. Per McSherry, J.

17. Jones v. Commonwealth, 86 Va. 661.

§ 89

cannot be affected by the pendency of the examination of the accused before the coroner,18 or before a police magistrate or other officer authorized to issue a warrant for the arrest and apprehension of the criminal offenders. 19

§ 89. Same subject—Contrary view.—In some jurisdictions, however, it has been decided that an indictment cannot be found unless there has been a preliminary examination, or the right thereto has been waived,20 or unless the accused has been previously committed or bound over.21 And where a preliminary examination is a prerequisite to an indictment, it is decided that if the indictment includes an offense for which the prisoner has not been

18. People v. Molineaux, 26 Misc. R. (N. Y.) 589, 57 Supp. 643.

19. Matter of Gessner, 53 Howard's Prac. N. Y. 515; People v. Heffernan, 5 Park. Cr. R. (N. Y.) 393; People v. Horton, 4 Park. Cr. R. (N. Y.) 222.

In the case of People v. Hyler, 2 Par. Cr. R. 566, Judge Cowels says, in considering this question: "I will not deny that in many cases, if the grand jury are apprized of the facts that the party is under arrest, and that the committing magistrate is proceeding with a full examination into the facts and circumstances attending the alleged offense, and particularly in that class of cases the prosecution of which is initiated upon the complaint of the individual, and so assume a character in some degree personal to the prosecutor, it would be very wise and judicious in the grand jury to defer action until the magistrate has made return of all testimony taken before him. will always enable both the grand jury and the public prosecutor, by an inspection of the return, to judge of

its character and form some opinion as to the probability of guilt or innocence, and the propriety of further prosecution. Such a discretion, if it exists on the part of the grand jury, would apply to all those cases where the alleged complaint is made to a justice of the peace, and to all other cases where a return of the proceedings and examinations had, are not made or the witnesses recognized to appear and testify before the grand jury, until the final close of the investigation before the committing magistrate. But an examination of the statute will show that in this case the grand jury possessed no such discretion. That they could not, had they been apprized of the fact that these parties were under arrest and before the coroner for examination, defer their own action, but were bound, if the testimony warranted, to indict."

20. Butler v. Commonwealth, 81 Va. 159; Jackson v. Common., 23 Grat. (Va.) 919.

21. State v. Jackson, 32 Me. 40.

tried or examined, the clause thereof which charged such offense should be quashed.<sup>22</sup> And where it is alleged that a party has been bound over by a police court or justice, to answer at the Supreme Court for the same offense charged in the indictment, it will not be inferred, because the asault is charged in different terms, that the same offense is not intended.<sup>23</sup> But though a person charged with a felony is entitled to a preliminary examination, under the statute, it is, however, held that it is too late, after verdict and judgment against him, to assert his claim for the first time in the Appellate Court.<sup>24</sup> In the case of a joint indictment, the fact that it is irregular, as to one, owing to there having been no preliminary examination as to him, will not invalidate it, in respect to the other person indicted, where he has had a preliminary examination and been bound over.<sup>25</sup>

§ 90. Necessity that accused be in custody.—Where there is no statutory provision requiring it, it has been decided that a bill of indictment may be presented to the grand jury by district attorney without the previous arrest of the defendant on a warrant supported by an affidavit.<sup>26</sup> It may, however, by virtue of the express provisions of a statute, be a prerequisite to the finding of an indictment that the accused shall have been previously committed or bound over.<sup>27</sup> Under an early statute in Missouri it was made a misdemeanor for a grand juror, a judge, prosecuting attorney, or other officer of any court, to disclose the fact of any indictment, for a felony, being found, unless the defendant was in custody or on bail.<sup>28</sup> Where it is essential to the validity of an

22. Scott v. Commonwealth, 14 Grat. (Va.) 687; Clere v. Commonwealth, 3 Grat. (Va.) 615.

23. State v. Bean, 36 N. H. 122.

State v. Stewart, 7 W. Va.
 731, 23 Am. Rep. 623.

25. State v. Jackson, 32 Me. 40.

26. State v. Bullock, 54 S. C. 300,
32 S. E. 424; State v. Bowman, 43
S. C. 108, 20 S. E. 1010; United
States v. Kilpatrick, 16 Fed. 765.

See Commonwealth v. Shupp, 6 Kulp. (Pa.) 430.

27. State v. Jackson, 32 Me. 40, decided under Stat. 1842, ch. 27, § 1.

28. State v. Corson, 12 Mo. 404, wherein the court held that under the provisions of the statute it was the duty of the clerk not to enter on his docket, or minutes or records the fact of the grand jury finding a bill of indictment against a defendant for

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indictment that the accused should have been in custody and it does not appear from the record whether he was or was not, it will be presumed that he was in custody.<sup>29</sup>

§ 91. Where apprehension of offender a ground of jurisdiction.—When the apprehension of an offender is made the ground of jurisdiction, such apprehension must have occurred prior to the finding of the indictment and must be alleged therein. This principle has been established in several cases, under a statute providing that an indictment for bigamy may be found in the county in which such subsequent or second marriage or co-habitation shall have taken place, or in the county in which the offender may be apprehended.<sup>30</sup>

a felony, unless he be in custody or on bail, nor to enter the continuance of the cause from term to term. The court said in this connection: should keep a private memorandum book, in which all such indictments for felonies are entered, and which, together with the indictments, should not be open to the inspection of any person except the officers mentioned in the statute; and such indictment should never be docketed nor entered on the minutes nor records of the court until the defendant is in custody: otherwise the statute is nugatory. Why require the secrecy under a penalty of a misdemeanor if the officer keeping the records is required to docket and note the case and the continuance thereof from term to term? What is the object of these statutory provisions? What evil was to be guarded against? Criminals, knowing that they had been indicted, often made their escape before the officers could arrest them. It was to prevent this and to render the administration of the criminal law more efficacious, officers were required not to disclose the finding of indictments for felonies; grand jurors were under the same requisition. Indictments were not to be open to inspection. All this was to be kept secret until the defendants should be arrested." Per RYLAND, J.

29. Harrington v. State, 36 Ala. 236.

30. State v. Fitzgerald, 75 Mo. 571, decided under Rev. Stat., § 1536, as to indictments for bigamy. State v. Griswold, 53 Mo. 181. See Collins v. People, 1 Hun (N. Y.), 610, decided under 3 Rev. Stat. (5th ed.) 968, § 10. Compare State v. Sweetsir, 53 Me. 438, decided under Rev. Stat., ch. 124, § 4, providing that "the indictment for such offense may be found and tried in the county where the offender resides, or where he is apprehended" and holding such a provision as permissive and not mandatory.

Constitutionality of statute.— In a case in Missouri decided later than those above cited it is held that § 92. That arrest or custody is illegal is immaterial.—The fact that previous to the finding of an indictment the accused was illegally arrested, does not affect the validity of the indictment and is no ground for quashing it.<sup>31</sup> So in a case in New York it was decided that it was no ground for quashing an indictment that before it was found, and after the issuing to the officer by a police justice of a warrant for his arrest, by an agreement between the officer and some person in Canada, the prisoner was forcibly brought from Canada to the line of that State, and there delivered to such officer, in arrest, under the warrant.<sup>32</sup> The court here said: "The objection to the arrest has no application to the indictment. For aught that appears in the papers, that could and would have been found whether the defendant was within the jurisdiction or not. There is no reason shown for quashing the indictment." <sup>33</sup>

§ 93. As to time of finding indictment—Generally.—As to the time when a person may be presented by indictment, it has been declared that a presentation by indictment must be made during a session or term of the court, since there can be no grand jury at any other time.<sup>34</sup> And an indictment found by a grand

a statute which provides that a person may be indicted for bigamy in a county other than that in which the offense was committed is in violation of the Constitution of that State. State v. Smiley, 98 Mo. 605, 12 S. W. 247.

31. State v. Brooks, 92 Mo. 542, 571, wherein the court said: "Conceding (without deciding), that, previous to the finding of the indictment, the forms of law had not been pursued in arresting the defendant, and that such arrest was illegal, it affords no ground for quashing the indictment, and it has been so ruled in the following cases, and we have not been able to find a contrary ruling by any court of last resort." Per

NORTON, J., citing People v. Rowe, 4 Park. Cr. (N. Y.) 253; Dou's Case, 18 Pa. St. 37; State v. Brewster, 7 Vt. 118; United States v. Lawrence, 13 Blatchf. 295. See also State v. Chyo Chiagk, 92 Mo. 395.

32. People v. Rowe, 4 Park. Cr. (N. Y.) 253.

33. Per CLINTON, J.

34. State v. Corbit, 42 Tex. 88, per Moore, J. It was, however, held in this case that an information could be presented during vacation and that it was no valid objection to an information which was otherwise regular that it was not presented to the court at a time when it was in session.

§ 94

jury at a term of court held at a time unauthorized by law is a nullity, and so are the proceedings thereon. Such an indictment should be quashed, and after conviction thereon judgment should be arrested on motion.35

A grand jury cannot, however, dissolve itself and a grand jury which is not impanelled for any particular time prescribed by law and is not discharged by the court in which it is acting, still exists as an original body, with power to perform its duties.36 The grand jury, when properly organized, meets and adjourns upon its own motion, without reference to the temporary adjournment of the court, and it may lawfully proceed in the performance of its duties whether the court is actually in session or not. This right to remain in session would not, of course, extend beyond the final adjournment of the court for the term, but within such limits it would be governed by its own wishes, subject to the control that the court at all times has over it. 37 So where a grand jury is selected to serve for one year, commencing at term next after first day in January, and when impanelled it is a legally constituted body, the fact that the last term of the year extends beyond the first day of January is held not to terminate the powers of the grand jury, and action taken by it after such time but before the adjournment of the term is valid.38 And where a grand jury has been dismissed before the final adjournment of the court it may, if necessary, be resummoned to attend again at the same term.39

§ 94. Where grand jury for one term holds over—De facto grand jury.-Where the grand jury summoned and impanelled for one term of court holds over into the next term, and at such second term is recognized by the court as a lawful grand jury, it

<sup>35.</sup> Davis v. State, 46 Ala. 80.

<sup>36.</sup> In re Gannon, 69 Cal. 547. See also People v. Leonard, 106 Cal. 302. In State v. Bennett, 45 La. Ann. 54, it is held that the grand jury is drawn to serve until discharged by the court and not for any particular week.

<sup>37.</sup> Nealon v. People, 39 Ill. App. 483.

<sup>38.</sup> State v. Winebrenner. Iowa, 230, 25 N. W. 146.

<sup>39.</sup> Long v. State, 46 Ind. 582; State v. Reid, 20 Iowa, 413.

is a grand jury de facto, and as against collateral proceedings (as in a case of writs of habeas corpus) the indictments found by it at the second term are valid and give the court jurisdiction to issue writs of arrest and commitments.<sup>40</sup>

40. Dunn v. Noyes, 87 Wis. 340, 58 N. W. 386, 41 Am. St. R. 45, 27 L. R. A. 776. The court said: we understand the law, the court below had no right in this collateral proceeding to inquire into the legality of that grand jury and decide it to have been an illegal body without authority to find the indictments. nor has this court the right to so in-We are precluded quire and decide. inquiring and determining whether the body of men that acted as a grand jury in finding the indictments was a grand jury de jure, by the barrier the law sets up to protect the acts of that body in the interest of the public and public justice as a grand jury de facto. The de facto doctrine, which was introduced into the law as a matter of policy and necessity to protect the interest of the public where those interests were involved in the official acts of persons exercising the duties of an officer without being a lawful officer, has its most salutary application to the acts of a grand jury and of other official instruments of the courts which constitute judicial proceedings. The courts are supposed to select and determine the qualifications of their subordinate official instruments necessary to the administration of justice. Their acts cannot be questioned without seriously affecting the proceedings of the courts and the conclusiveness of their judgments. grand jury in question was sum-

selected, moned, impanelled, sworn for the September term of the court, and held its session and did business during that term. There is no question but that it was a legal grand jury throughout the September term. On the last day of that term this same body adjourned with the court, to the first day of the October term and continued its unfinished business. It is contended that this body became functus officio as a grand jury on and after the last day of the September term. It was recognized by the court as a lawful grand jury, and the court received the indictments found by it, and finally discharged it from further service and ordered the payment of its fees. The legal grand jury of the September term simply held over its term. There cannot be a more appropriate application of the de facto doctrine than to such a body as a grand jury de facto while thus holding over and doing business in the October term of the court." court, after considering at length cases on this subject, said in con-"It would put an end to judicial proceedings if the legal title and qualifications of all judicial efficers could be contested in collateral proceedings at the instance of aggrieved parties. This is a very important question, and a new one in this court. We have cited all the cases at hand, and from the high character of the courts they ought to

# § 95 Power and Jurisdiction of Grand Jury.

§ 95. Power of grand jury to find indictment during vacation.—As has been said in a preceding section, it is essential to the validity of an indictment that it be found during a term or session of the court.<sup>41</sup> It may, therefore, be stated generally that an indictment cannot ordinarily be found during vacation. But though a judge may have no power to convene the grand jury during vacation, yet it is decided that this objection, though it may have been properly raised by challenging the array or by pleading it in abatement, does not afford a cause for arresting the judgment.<sup>42</sup>

The power, however, to draw a grand jury at such a time may exist by virtue of a statute, and in such a case an indictment found by the grand jury will be valid. So under a statute a code providing that "whenever the session of any court of record in this State shall be prolonged beyond the week or period for which juries were drawn at the close of the preceding term, as by law provided, or the judge anticipates that the same is about to be prolonged, or from any other cause such court has convened, or is about to convene, and there have been no juries drawn for the same, it shall and may be lawful for such judge to draw juries, so many as may be necessary for such court, and cause them to be summoned accordingly, in the manner prescribed for drawing juries at the close of the regular terms of such courts respectively," it has been decided that the power conferred upon the judge is one to be exercised by him either in term or vacation, and that when he discovers the emergency exists, no matter for what reason, he can draw the juries and cause them to be summoned, and that if the grand jury be organized pursuant to this law it is a legal jury. It would, therefore, in such a case, be no objection

be considered not only satisfactory, but sufficient, especially when based upon such cogent and conclusive reasons. We hold, therefore, that the indictments found against the defendants are not void but good and valid indictments, so far as this col-

lateral procedure is concerned, because found by a grand jury acting under color of lawful authority and a good and sufficient grand jury defacto." Per Obton, J.

- 41. See § 93 herein.
- 42. Miller v. State, 69 Ind. 284.

to an indictment that it was found by the grand jury during vacation.43

§ 96. Power to find indictment at an adjourned term.— Where an adjourned term is a continuance of the regular term, it is competent for a grand jury, if impanelled, to inquire into offenses.<sup>44</sup> The mere adjournment of the court will not of itself operate to discharge the grand jury, and therefore a grand jury summoned for a regular term of court has power to find indictments at an adjourned term, unless discharged in the meantime. The order of adjournment does not have the effect of discharging them or putting an end to their powers.<sup>45</sup>

So in a case in Indiana it was decided that an indictment would not be quashed because found at an adjourned term of the Circuit Court. And in a case in Nebraska, where it appeared that the regular term of a court, fixed by law to be holden on the 13th of September, was adjourned in vacation by the written order of the judge, until the 13th of December following, at which time the grand jury, summoned for the regular term, were returned and impanelled, an indictment found and trial and conviction had, it was held there was no error. And where authority to hold an adjourned term of the court when the business requires it, to

**43.** Holman v. State, 79 Ga. 155, 4 S. E. 8.

44. Sharp v. State, 2 Iowa, 455; State v. Peterson, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324, holding that the district court has the power, under the statute, to discharge the grand jury impanelled at a regular general term of the district court, adjourn the term to a future day, and order a new venire of grand jurors to be drawn and summoned for such adjourned term.

45. State v. Pate, 67 Mo. 488.

**46.** Ulmer v. State, 14 Ind. 52, decided under act of 1885 providing "That if at the close of any term of

the Circuit Court of any county or when it shall become necessary or proper for said court to adjourn for any cause, the business pending therein shall not be finished, it shall be lawful for such court to adjourn until some other certain time to be specified in the adjourning order, of which public notice shall be given in some manner to be specified by said court; and at such time such court shall meet and continue in session so long as the business shall require, and such adjourned session shall be deemed a part of the regular term of such court."

47. Smith v. State, 4 Neb. 277.

# § 97 Power and Jurisdiction of Grand Jury.

close the dockets, is given, it has been decided that the words "to close the dockets" are not to be regarded as limiting the business done or to prevent other business going upon the dockets. The adjourned term under such a statute is merely a continuation of the regular term, and the court when in session has the same full power and jurisdiction which it would have at the regular term. It is, therefore, held in such a case to be no ground for quashing an indictment that it was found at an adjourned term.<sup>48</sup>

§ 97. Power to find indictment at special term.—Where a judge has authority to call a special term of court, and there is no limitation upon the power conferred, his jurisdiction and authority is generally as full and plenary as at a regular term, and an indictment found by a grand jury at such special term will, in the absence of some other objection thereto, be valid and a judgment and conviction thereunder will not be irregular or So in New York, under a code provision that "The governor may, when, in his opinion, the public interest so requires, appoint one or more extraordinary general or special terms of the Supreme Court, or terms of a Circuit Court, or Court of Oyer and Terminer," it was decided that where an extraordinary term of the Court of Over and Terminer was so called there was ample authority for drawing a grand jury under the statute which provided that a grand jury may be drawn "For the Court of Over and Terminer of the county of Kings, upon the order of a judge of the Supreme Court elected in the second judicial dis-And under a statute providing that the judge of any

48. Sims v. State, 51 Ga. 495.

49. Alabama.—Bales v. State, 63 Ala. 30.

California.—People v. Carabin, 14 Cal. 438.

Illinois.—Gardner v. People, 4 Ill. 83.

Iowa.—Sharp v. State, 2 Iowa,

Mississippi.—Young v. State, 2 How. 865.

Compare State v. Brown, 127 N. C. 562, 37 S. E. 330, holding that a quashal of an indictment returned by a grand jury at an extra term of the Superior Court was proper where the statute providing for an extra term made no provision for a grand jury.

**50.** People v. McKane, 80 Hun (N. Y.), 322, decided under Code Crim. Proc., § 226.

Circuit Court may at any time hold a special term for trial of persons charged with crime and confined in jail, by making out a written order to that effect and transmitting it to the clerk, who shall enter the same upon the record of the court, it was held that this embraced not only such cases as have been passed upon by a grand jury, but also where the defendant has been charged before a magistrate, and, consequently the court has the power of directing a grand jury to be summoned to such special term.<sup>51</sup>

The validity of an indictment found at a special term of the Circuit Court will not be affected by the fact that, had the case been tried at such special term, it could not have been concluded before the regular term of another Circuit Court in the same district.<sup>52</sup>

§ 98. Word "trial" in act providing for special term construed.—The word "trial" in an act providing for the holding of special terms of court "for the trial of criminals and for that purpose alone," <sup>53</sup> is to be construed in its general and enlarged sense and signifies all that is to be done in a cause, and includes as well the finding of the indictment as those proceedings after the issue has been determined. <sup>54</sup>

51. Mary v. State, 5 Mo. 79.

52. Hamilton v. State, 62 Ark. 543. The court said: "The validity of the proceedings at such special term cannot be affected by the contention that, if something had occurred that did not occur, the special term would have interfered with the regular term. Enough for us to know on that point is that the special term did not interfere with any other term of the court. The motion to quash the indictment on this ground was properly overruled." Per RIDDICK, J.

**53.** See Iowa Sessions Acts 1858, chaps. 134, 259.

54. State v. Wash, 7 Iowa, 347. Judge STOCKTON said in this case:

"It is true that the language used would bear a different construction, by giving to the word 'trial' the more narrow and restricted meaning in which it is sometimes used to express the investigation and decision of facts only. This is not, however, the more natural and obvious sense in which it is used in this instance. In its more general and enlarged sense, the word is used to signify all that is to be done in a cause, from its inception to its termination, or until final judgment is pronounced. In this sense, the word includes. as well the finding of the indictment against a criminal, as the proceedings of the court had after the issue has

§ 99. Power to find indictment at term other than that following commitment.—At common law it is said that the grand jury had no authority to continue a case which had been submitted to them for investigation by another grand jury.<sup>55</sup> however, a matter regulated to a great extent by statute, and in many States statutes have been passed providing that an indictment must be found at the next term of court after the accused is committed or bound over, unless "good cause be shown," or unless the case falls within certain specified exceptions.<sup>56</sup> But where the prisoner moved the court before the grand jury was impanelled to discharge him from imprisonment on the ground that two terms had elapsed since he had been held to answer, without any indictment having been found against him it was held that, as the question was not raised by plea or otherwise after the indictment was found, it was not properly brought up for review by writ of error. The proper remedy was held to be by habeas corpus, but it was decided that the time for that had also passed, the prisoner being detained in custody, not by virtue of the original commitment, or the order overruling the motion, but the final judgment in the case.<sup>57</sup>

Where there is no statute requiring an indictment at the next term of court, it has been decided that the fact that a regular term has intervened since the commitment of the accused and no indictment found against him does not entitle him to his discharge

been determined, and a verdict of the jury rendered. If we confine its meaning to the limits sought to be fixed for it by the counsel for defendants then the business of the district court, at the special term, would have been limited to the decision of issues in fact, in criminal cases, and it would have had as little power to pronounce judgment after verdict, as to summon a grand jury for the finding of indictments."

55. State v. Graham, 136 Ala. 134,33 So. 826.

56. Nebraska.—Cerny v. State,

62 Neb. 626, 87 N. W. 336; Leisenberg v. State, 60 Neb. 628, 84 N. W. 6; Ex parte Two Calf, 11 Neb. 221, 9 N. W. 44.

**Nevada.**—Ex parte Job, 17 Nev. 184, 30 Pac. 699; State v. Lambert, 9 Nev. 321.

Ohio.—State v. Lott, 5 Ohio S. & C. P. Dec. 600.

Texas.—Bennett v. State, 27 Tex. 701.

Virginia.—Waller v. Commonwealth, 84 Va. 492, 5 S. E. 364.

**57.** Glover v. Commonwealth, 86 Va. 382, 10 S. E. 420.

unless he can show, in addition, that the charge against him was fully investigated by the grand jury.<sup>58</sup> So it has been decided that the failure of the grand jury to find an indictment does not entitle an accused person to discharge from custody where the record fails to show that the grand jury heard evidence, or acted upon the accusation against him. And the law will not presume in such a case that evidence was heard and that the grand jury ignored the bill. "Although it may be a legal presumption that a court was held at the time fixed by law, and a grand jury was regularly impanelled, still it will not be presumed that they acted upon a particular case." 59 And in a case in Alabama it is said: "It is well settled with us, that when one is bound over to the Circuit or City Court, to answer an indictment, his case pends through the term of the court to which he is bound, unless sooner discharged. If the court should fail before the adjournment of its term to take any action in the case, the mittimus by which the defendant is held would become exhausted-functus officioleaving nothing upon which defendant could longer be detained. But, if the court, no indictment having been found, should enter an order of continuance of the case for further investigation by a grand jury, a discontinuance would be intercepted, the life of the mittimus preserved, and defendant properly held thereunder." 60

Where, however, it appears that the court has adjourned without taking any action whatever in the case, the fact that an order of continuance is shown to have been entered upon the docket kept by the grand jury, does not prevent the discontinuance of the prosecution.<sup>61</sup>

58. Ex parte Jefferson, 62 Miss. 223.

59. People v. Hessing, 28 Ill. 410, per Walker, J.

60. Young v. State, 131 Ala. 51, 31 So. 373, per Habalson, J., citing Rogers v. State, 79 Ala. 59; Ex parte Stearnes, 104 Ala. 97; Fuller v. State, 122 Ala. 32.

61. State v. Graham, 136 Ala. 134,

33 So. 826. The court said: "While our statutes have enlarged the scope of the powers and duties of the grand jury, they have not conferred upon them the authority of continuing cases so as to prevent a discontinuance of the prosecution. Such an order to have that effect must be made by the court." Per Tyson, J., citing Rogers v. State, 79 Ala. 59, 61.

§ 100. Same subject—Under particular statutes.—Where a statute provides that "when a person has been held to answer for a public offense, if an indictment be not found against him at the next term of the court at which he is held to answer, the court shall order the prosecution to be dismissed, unless good cause to the contrary be shown," the case in which a dismissal is not to follow the non-presentment of an indictment against the accused is exceptional, and he has a right to depart "unless good cause to the contrary be shown." "This general provision of the statute, that the prisoner is not to be held indefinitely, is designed to secure to him a speedy trial, and this right is absolute, except some good cause be shown which may be supposed to take the case out of the operation of the general rule. What is 'good cause' may be difficult to define with precision. since it must, in a great measure, be determined by reference to the particular circumstances appearing in each case. There should, undoubtedly, be some fact or circumstance disclosed to the court, upon which its authority, in this respect, somewhat discretional, could be brought into exercise. Its discretion is not to be arbitrary, but should proceed upon such knowledge or information as would enable it to determine for itself whether or not public justice requires the further detention of the prisoner, notwithstanding the delay upon the part of the prosecution." 62 where a statute provides that an accused person shall be discharged from custody upon the refusal of the grand jury at the next term to indict, unless the court be of the opinion that the charge be submitted to another grand jury, and so direct, the failure of the first grand jury to indict is to be treated as a direct refusal to indict, and a subsequent grand jury cannot indict unless the charge is submitted to them by the direction of the court. It has, however, been decided that in such a case, if an indictment is subsequently found by another grand jury without the charge having been submitted to them by the direction of the court, the defendant waives the right to have it dismissed upon that ground, if he pleads to it without making a motion to dismiss.63

62. Ex parte Bull, 42 Cal. 196, per WALLACE, J. 63. Sutton v. Commonwealth, 97 Ky. 308, 30 S. W. 661.

- § 101. Indictment found pending habeas corpus proceedings.

   The fact that an indictment was found against a person during the pendency of habeas corpus proceedings for his discharge is not a ground for quashing an indictment or for arrest of judgment after conviction. 64
- § 102. Constitutional provision as to right to be heard construed.—A constitutional provision that "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel, to demand the nature and cause of the accusation, and to be confronted by the witnesses against him and to have compulsory process to obtain witnesses in his favor," is held not to apply to an inquiry before a grand jury or to render it essential to the validity of an indictment that the accused should be present at such inquiry, or that notice should be given him for the purpose. 65
- § 103. Indictment must be founded upon evidence. It is essential to the legal creation or existence of an indictment that it be founded upon evidence heard by the grand jury. 66 So it has been said that: "It is the duty of the court, in the control of its proceedings, to see to it that no person shall be subjected to the expense, vexation, and contumely of a trial for a criminal offense, unless the charge has been investigated and a reasonable
- 64. Clark v. Common., 123 Pa. St. 555, 16 Atl. 795, 23 W. N. C. 317. The court said in this case: "Upon this record it is urged that it was the duty of the court below to quash the indictment, and having refused to do that, to arrest judgment on the verdict. No decision of this or any court has been cited, to sustain this view of the law, and the counsel who advocate it confess that their research has failed to discover one." . . . "In our case, the Court of Oyer and Terminer had jurisdiction of the crime with which

the defendant was charged, and proceedings there cannot be disturbed or affected by the pendency of a writ of habeas corpus allowed on his petition in the Court of Criminal Pleas. We cannot convict the court below of error for refusing to quash the indictment, or to arrest judgment on the verdict." Per Mr. Justice McCollum.

**65.** State v. Wolcott, **21** Conn. 272.

**66.** State v. Grady, 12 Mo. App. 361, 364.

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foundation shown for an indictment or information. It is due also to the government to require, before the trial of an accused person, a fair preliminary investigation of the charges against him." <sup>67</sup> And it has also been decided that an indictment will be quashed where the testimony before the grand jury was illegal, as of the accused against himself, or of a wife against her husband. <sup>68</sup>

But where witnesses have been duly sworn and sent to a grand jury, and an indictment found and presented, it is not necessary that they should be recalled and re-examined, to warrant the grand jury in finding another indictment against the same person and before the former one has been nolled. 69 The court said in this case: "The finding of the first indictment could not exhaust its powers concerning the matter inquired into. All the proceedings of a grand jury may be regarded as in fieri until its final adjournment. And, hence, the grand jury in this case had the power upon the same evidence to find another indictment, with the same or different counts, if in its judgment, the administration of justice required it. It will not infrequently happen that, for some defect in the indictment presented, or for the want of counts that should have been inserted to meet the possible aspects of the testimony when the accused comes to be tried upon the indictment, it is prudent to present a new indictment, adapted to such contingencies, leaving the prosecutor to nolle the first one, as was done in this case. And, in such case to require the witnesses to be again subpoenaed, sworn and sent to the grand jury for re-examination, would be a requirement of no value whatever to the accused, and unsupported by any reason." 70

67. United States v. Farrington, 5 Fed. 361, 364, per WALLACE, J. See, also, Sparrenberger v. State, 53 Ala. 481.

68. State v. Froiseth, 16 Minn.

296. See Royce v. Territory, 5 Okla.61, 47 Pac. 1083.

69. Whiting v. State, 48 Ohio St. 220, 27 N. E. 96.

70. Per MINSHALL, J.

#### CHAPTER V.

#### FINDING AND RETURN OF GRAND JURY.

- Section 104. Power of grand jury to find specially or conditionally; general rule.
  - 105. Same subject; exact grade of crime not for grand jury.
  - 106. Finding of indictment not prevented by pendency of another.
  - 107. Same subject; as affected by statutes.
  - 108. Same subject; where nolle prosequi entered on first indictment, demurrer sustained or judgment arrested.
  - 109. Same subject; where first indictment fatally defective.
  - 110. Same subject; where second indictment quashed.
  - 111. Same subject; in case of change of venue.
  - 112. Same subject; what plea alleging pendency of another indictment should state.
  - 113. Indictment against several may be found true as to one.
  - 114. Different offenses in same indictment.
  - 115. Different offenses in different indictments.
  - 116. Same subject; rules illustrated.
  - 117. Effect of action by grand jury; right to reconsider.
  - 118. Same subject; qualification of rule.
  - 119. Power of court to resubmit bill to grand jury.
  - 120. Resubmission of charge where no indictment found; limitation on power.
  - 121. Same subject; statutory provisions may control.
  - 122. Where order of resubmission uncertain.
  - 123. Finding of grand jury cannot be varied by extrinsic evidence; general rule.
  - 124. Same subject; as to evidence on which indictment found.
  - 125. Same subject continued.
  - 126. Same subject concluded.
- § 104. Power of grand jury to find specially or conditionally—General rule.—The grand jury cannot return a finding regardless of the bill which is submitted to them, but should be controlled thereby. So it is said by an early authority in this connection that "It seems to be generally agreed, that a grand jury must either find

billa vera or ignoramus, for the whole; and if they take upon themselves to find specially or conditionally, or to be true for part and not for the rest, the whole is void, and the party cannot be tried upon it but must be indicted anew." 1 Therefore a grand jury cannot find a bill true as to part of a count and ignore the rest of the count.<sup>2</sup> So in a case in South Carolina it is decided that where the grand jury, on a count for riot and assault in the indictment, find an indictment for riot, there is only a partial finding of the entire count and it is void. And where a bill is presented to a grand jury charging an assault with intent to commit murder in the first degree, they cannot negative the felonious intent and find a true bill as to the assault and battery.4 But where there are several counts in a bill and each count contains a distinct charge, the grand jury may find one count true and ignore the others.5

§ 105. Same subject—Exact grade of crime not for grand jury. -The general rule as to the want of power on the part of the grand jury to find conditionally or specially extends to those cases where a criminal act consists of different degrees. In such a case there is no power on the part of the grand jury to determine the exact grade of crime and return a finding to that effect but they must find either a true bill or not a true bill, in accordance with the bill submitted to them. So it is said in a case in Tennessee: "The rule seems to be well established that the grand jury cannot find one part of the same charge to be true and another part false, but must either maintain or reject the whole. It is not the

- 1. 2 Hawkins P. C. 300, tit. Indictment, § 2, quoted in State v. Creighton, 1 Nott. & McC. (S. C.)
- 2. State v. Ewing, 127 N. C. 555, 37 S. E. 332.
- 3. State v. Creighton, 1 Nott. & McC. (S. C.) 256.
- 4. State v. Wilhite, 11 Humph. (Tenn.) 602. Judge McKinney said: "All the authorities concur, that the

grand jury cannot find part of an entire count true, and another part false, as in some instances a petit jury may, but must either maintain or reject the entire count."

5. State v. Ewing, 127 N. C. 555, 37 S. E. 332, citing Wharton's Cr. Pl. & Prac. (9th ed.), § 374; State v. Thomas (S. C., 1906), 55 S. E. 893; State v. Wilhite, 11 Humph. (Tenn.) 602.

province of the grand jury to ascertain, or determine the exact grade of the criminal act (in crimes that admit of degrees) of which the accused is charged in the indictment. This remains for the petit jury, charged with his trial, under the control and instructions of the court." <sup>6</sup> So where an indictment charged murder it was decided that the grand jury had no power to return it for murder in the second degree, <sup>7</sup> or for manslaughter. <sup>8</sup>

§ 106. Finding of indictment not prevented by pendency of another.—Pendency of a former indictment does not bar a second one for same offense,<sup>9</sup> and as a general rule the fact that another

6. State v. Cowan, 1 Head (Tenn.), 280. Per McKinney, J., citing 1 Chitty's Cr. Law, 2; 1 Russ on Cr., 312; 1 Arch. Cr. Pr. (by Waterman), 98 to 104, note 5.

7. State v. Ewing, 127 N. C. 555, 37 S. E. 332. Judge Montgomery said in this case: "The petit jury is the tribunal upon which is devolved by the statute the duty of fixing the degree of guilt, whether murder in the first or murder in the second degree, upon the evidence of both the State and the prisoner. The distinction between murder in the first and murder in the second degree, under the act of 1893, is not for the grand jury to point out and determine, but is a matter for the action of the petit jury after hearing all the evidence and receiving the instruction of the court. The law declares that the form of the indictment is immaterial as between the two crimes, and that the petit jury shall be charged with the duty of declaring the grade of the crime, as between murder in the first and murder in the second degree, and not for the grand jury. And this appears to me to be necessarily so, for, if the solicitor should conform wishes of the grand jury, as expressed in their finding, and send in a bill for murder in the second degree, the bill would be in the exact language of the one upon which the grand jury undertook to act. therefore, of the opinion that the grand jury transcended its power in finding the bill 'a true bill for murder in the second degree,' in that it undertook to prescribe a verdict for the petit jury, and that his Honor was right in sustaining the demurrer."

8. State v. Cowan, 1 Head (Tenn.), 280; State v. Wilhite, 11 Humph. (Tenn.) 602, citing 2 Chitty's Cr. L. 492 (Riley's Ed.).

9. Georgia.—Pride v. State, 125
Ga. 748, 54 S. E. 688; Irwin v. State,
117 Ga. 706, 45 S. E. 48.

Kentucky.—Monroe v. Berry, 29 Ky. Law R. 602. 94 S. W. 38, decided under Cr. Code Proc., § 116.

Louisiana.—State v. Stewart, 47 La. Ann. 410, 16 So. 945.

Massachusetts. — Commonwealth v. Berry, 5 Gray (Mass.), 93.

Missouri.—State v. Eaton, 75 Mo. 586, overruling State v. Webb, 74 Mo.

indictment had previously been found is not a good ground for a plea in abatement or motion to set aside the subsequent indictment though the same offense may be charged in both, 10 nor is

333; State v. Smith, 71 Mo. 45, and cited and followed in State v. Goddard, 162 Mo. 198, 62 S. W. 697.

Ohio.—O'Meara v. State, 17 Ohio St. 515.

**Texas.**—Bonner v. State, 29 Tex. App. 223, 15 S. W. 821.

Where a new trial has been granted another indictment may be found. State v. Lee, 114 N. C. 844, 19 S. E. 375; State v. Friedrich, 4 Wash. 204, 29 Pac. 1055.

Nolle prosequi not necessary where new trial granted.—Where a person who is convicted of a crime for which he has been indicted, and he makes a motion for a new trial, which is granted, a new indictment may be found against him without a nolle prosequi being entered as to the first. Pride v. State, 125 Ga. 748, 54 S. E. 688.

Alabama.—Bell v. State, 115
 Ala. 25, 22 So. 526.

Arkansas.—Hudspeth v. State, 50 Ark. 534, 9 S. W. 1, decided under Mansf. Dig., § 2130; see Nash. v. State, 73 Ark. 399, 84 S. W. 497.

Colorado.—Mason v. People, 2 Colo. 373.

Connecticut.—State v. Keena, 64 Conn. 212, 29 Atl. 470.

**Florida.**—Smith v. State, 42 Fla. 236, 27 So. 868; Eldridge v. State, 27 Fla. 162, 9 So. 448.

Georgia.—Irwin v. State, 117 Ga. 706, 45 S. E. 48; Doyal v. State, 70 Ga. 134.

Illinois.—Gannon v. State, 127 Ill. 507, 21 N. E. 525. Indiana.—Dutton v. State, 5 Ind. 533.

Kansas.—State v. Curtis, 29 Kan. 384.

Louisiana.—State v. Stewart, 47 La. Ann. 410, 16 So. 945.

Massachusetts.— Commonwealth v. Cody, 165 Mass. 133, 42 N. E. 575; Commonwealth v. Drew, 3 Cush. 279.

Nebraska.—Bartley v. State, 53 Neb. 310.

New York.—People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501.

North Carolina.—State v. Hastings, 86 N. C. 596, approving State v. Dixon, 78 N. C. 558.

Ohio.—O'Meara v. State, 17 Ohio St. 515.

South Dakota.—State v. Security Bank, 2 S. D. 538, 1 N. W. 337.

In O'Meara v. State, 17 Ohio St. wherein this question raised, the court said: "It is insisted, in the first place, that the indictment under which the defendant was convicted is a nullity, because of the pendency of a former indictment for the same offense, at the time it was found. We know of no such law. The last indictment is as valid as the first. Two indictments for the same offense are often pending at the same time. The State can only proceed upon one of them, but may elect upon which it will proceed. course, the right of election implies that both are good and lawful indictments." Per Welch, J.

The plea of lis pendens does not hold as in civil cases. If justice such a plea a good ground for a motion in arrest of judgment.11 So it was said by Chief Justice Shaw in an early case in Massachusetts that "It appears to us to be a settled rule of law, that the pendency of one indictment is no good plea in abatement to another indictment for the same cause. Whenever either of them -and it is immaterial which—is tried and a judgment rendered on it, such judgment will afford a good plea in bar to the other, either of autrefois convict or autrefois acquit." 12 And this is held to be true though the accused may have already been arraigned and pleaded to the first indictment. 13 The fact, therefore, that an indictment is missing and undisposed of does not prevent a conviction upon a second indictment, it being declared that if both indictments were in court, the defendant could be tried upon either. 14 So in the absence of any statute requiring the quashal of one of two indictments found for the same offense, such quashal is not a right to which the accused is entitled but may be exercised by the court in its discretion. <sup>15</sup> But where two indictments have been found for the same offense the accused cannot be tried on both but the state must elect upon which it will prosecute the defendant.16

## § 107. Same subject—As affected by statutes.—This matter

requires it, the court, in its discretion, will quash one of two pending indictments. Nevertheless, a man may be held on two or more indictments without that fact being of itself a bar to proceeding under one of the two. State v. Michel, 111 La. 434, 35 So. 629.

That there is no such plea to an indictment as the pendency of a former indictment in the same case, or as autre fois arraign, we are well satisfied; indeed this was expressly so ruled in the case of the King v. Swain & Jeffreys, Foster's Crown Law, 104, 105, 106; citing 10 St. Tri. 36; Cro. Cas. 147; 3 Bur. 1468.

Doyal v. State, 70 Ga. 134. Per HALL, J.

- 11. Commonwealth v. Murphy, 11 Cush. (Mass.) 472; Commonwealth v. Clemmer, 190 Pa. St. 202, 42 Atl. 675; Bonner v. State, 29 Tex. App. 223, 15 S. W. 821.
- 12. Commonwealth v. Drew, 3 Cush. (Mass.) 279, 282.
- 13. Bell v. State, 115 Ala. 25, 22 So. 526; People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.
- 14. Rosenberger v. Commonwealth, 118 Pa. St. 77, 11 Atl. 782.
- 15. State v. Michel, 111 La. 434, 35 La. 629.
- 16. Stuart v. Commonwealth, 28 Gratt. (Va.) 950.

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is also subject to statutory provision in some cases to the effect that when two indictments for the same offense are pending against a defendant, the first found shall be deemed suspended, and shall be quashed. Under such a statute it has been declared that the second indictment operates to set aside the first and it becomes the only legal indictment. 17 But what seems to be the true doctrine is asserted in a case in New York in which it is said that statutes declaring in terms that the first indictment shall be deemed to be superseded by the second, are intended simply to prescribe the rule of the case, and not that the first indictment shall become waste paper and nugatory without the action of the court. The second indictment does not ipso facto annul the first.18 And a similar doctrine is asserted in other cases. 19 And where a person has been

17. Hudspeth v. State, 50 Ark. 534, 9 S. W. 1; Mansf. Ark. Dig., § 2130; State v. Hall, 50 Ark. 28, 6 S. W. 20; State v. Goddard, 162 Mo. 198, 62 S. W. 697; Mo. Rev. St., § 2522.

Under a statute providing that the one first found shall be quashed it has been decided that a motion is not the proper procedure, but that the former should pleaded to the second. State Barkman, 7 Ark. 387.

When indictments not within of statute.-When application the two indictments are so diverse as to preclude the same evidence from sustaining both, and when each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction, they do not come within the application of a statute requiring that where there are two indictments for the same offense, although charged as different offenses, the indictment first found shall be quashed.

State v. Hall, 50 Ark. 28, 6 S. W. 20, citing 1 Bishop Cr. Law, § 1051.

18. People v. Monroe Oyer and Terminer, 20 Wend. (N. Y.) 108, per Nelson, J.

19. State v. Melvin, 166 Mo. 565. 66 S. W. 534.

An order of court is necessary in order to quash the first indictment.-" The statute does not say that the first indictment shall. on the finding of the second, become void, so that no trial or conviction thereupon can afterwards be had by confession or otherwise. Some action by the court, on motion, in behalf of the accused, or otherwise, to put that indictment out of the way, was evidently intended, and an order of the court was necessary to quash it." People v. Barry, 4 Park, Cr. (N. Y.) 657, per Bonney, J.

An order of court disposing of a former indictment is not absolutely essential, and a failure to make such an order will not be regarded as having prejudiced the detried and convicted on an indictment it is decided that such indictment will not be quashed on the ground that during the pendency of the trial a second indictment for the same offense was found by the grand jury.<sup>20</sup>

§ 108. Same subject—Where nolle prosequi entered on first indictment, demurrer sustained, or judgment arrested.—A special plea in abatement, alleging the pendency of another indictment against the accused for the same offense, is not a good plea where it appears that a nolle prosequi has been entered upon the first indictment.<sup>21</sup> So in a case in Kentucky, where the accused pleaded the dismission of a former indictment for the same offense it was held that the dismission of the first indictment by the prosecuting attorney, with the presumed consent of the court, even after the jury was sworn to try the case, was no bar to the last indictment, and the court declared that, there having been no trial, the accused was not in the constitutional sense either acquitted

fendant's substantial rights, or as affecting his trial and conviction under the subsequent indictment. Blyew v. Commonwealth, 91 Ky. 200, 15 S. W. 356.

The court may vacate an order declaring that the first indictment is superseded by a second one where it appears that the latter was void, ab initio, and never had any legal existence. People v. Mosies, 73 App. Div. (N. Y.) 5, 76 N. Y. Supp. 65.

20. People v. Monroe Oyer and Terminer, 20 Wend. (N. Y.) 108.

21. Jones v. State, 115 Ga. 814, 42 S. E. 271; Lascelles v. State, 90 Ga. 347, 372, 16 S. E. 945, 35 Am. St. Rep. 216, holding that where the court has allowed the solicitor-general to enter a nolle prosequi before putting the accused on trial, the latter, when arraigned upon a bill of indictment subsequently found and returned by the grand jury for the same

offense cannot, by plea in abatement or motion to quash, draw in question the rightful disposition of the former bill by nol. pros. Zachary v. State, 7 Baxt. (Tenn.) 1, holding it no error to overrule a motion to quash the second indictment.

Nol. pros. against consent of defendant.—A plea that a former indictment against the defendant for the same offense, and in which there were no fatal defects, was nol. prossed by the court against the consent of the defendant, is properly overruled. Bird v. State, 53 Ga. 602.

Pending the decision of the court in the case of a demurrer to an indictment, a second indictment may be found by the grand jury upon the same evidence. People v. Bissert, 71 App. Div. (N. Y.) 118, 75 N. Y. Supp. 630, affirmed 172 N. Y. 643, 65 N. E. 1120.

or put in jeopardy.<sup>22</sup> And where judgment is arrested it has been decided that a new indictment may be given out on the same warrant.<sup>23</sup> In many states this matter is subject to statutory provisions.<sup>24</sup>

22. Wilson v. Commonwealth, 3 Bush. (Ky.) 105.

23. State v. Thomas, 8 Rich. L. (S. C.) 295.

24. Cunningham v. State, 117 Ala. 59, 23 So. 693, holding that where a demurrer to an indictment is sustained and the defendant declines to consent to the amendment of the indictment, the court has authority, under the statute (Code of 1896, \$ 4918; Code of 1886, § 4390), to "order another indictment to be preferred at the same or a subsequent term, and after directing that a new indictment be preferred at the next term, the court has the power to change the order on the succeeding day of the term, so as to direct that the second indictment be preferred at the then present term, the defendant being present at the time of making the change. Terrill v. Superior Court of Santa Clara County (Col., 1899), 60 Pac. 38, 516, construing § 1008 of the Penal Code as amended in 1880, and which provided as follows: the demurrer is allowed the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, directs the case to be submitted to another grand jury, or directs a new information to be filed; provided that, after such order of re-

submission, the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases." State v. Evans, 111 Iowa, 80, 82 N. W. 429, holding where an indictment for committing a liquor nuisance was set aside as defective and judgment was entered that the cause be resubmitted to the grand jury, that the petit jury impaneled be discharged and that defendant recover costs, that such judgment was not a final judgment from which an appeal could be taken under Code § 5448, and that it did not discharge defendant or exonerate his bail under Code § 5331. Commonwealth v. Swanger, 108 Ky. 579, 57 S. W. 10, decided under Criminal Code of Practice, § 170, providing that where a demurrer to an indictment is sustained because of the failure of the indictment to charge facts essential to a good indictment, "the case may be submitted to another grand jury and an order to that effect may be made by the court on the record." This provision was held to confer upon the court the power to exercise its discretion in such a case and it was decided that the discretion was not abused by the refusal to so submit an indictment for perjury where the alleged false testimony was not necessarily material in determining the defendant's guilt or innocence of the charge on which he was tried when the testimony was Compare Commonwealth v. given.

- § 109. Same subject—Where first indictment fatally defective.—Where there are fatal defects in an indictment or in the organization of the grand jury by which it was found and a new one is preferred, it is not necessary that the first indictment shall be quashed before the second is found.<sup>25</sup>
- § 110. Same subject—Where second indictment quashed.—In the application of the rule that under such a statute the finding of a second indictment does not operate *ipso facto* as a quashal of the first but merely suspends it until some positive action has been taken which quashes the one first found the quashal of the second indictment only does not operate as a quashal of the first but in such a case the one first found is revived, the obstacle which caused its suspension having been removed.<sup>26</sup>
- § 111. Same subject—In case of change of venue.—While the accused is entitled to be indicted by the grand jury of the county where the offense is committed, yet it has been declared that this is not an absolute and indefeasible right which cannot be waived and that it is waived where upon his motion a change of venue is granted. In such a case, where the indictment upon which the change was granted is quashed he cannot object to a new indictment found in the county to which the cause was removed that it was not found in the county in which the offense was committed.<sup>27</sup> And it has been decided that a statute which provides that where

Shelby, 18 Ky. Law Rep. 781, 38 S. W. 490.

25. Perkins v. State, 66 Ala. 457, holding that the better and more usual practice is to the contrary. See Nordlinger v. State, 24 App. D. C. 406.

Where a bill is of doubtful validity it is a proper practice to send a second bill at the same term and not to postpone trial thereon, as a matter of course, till another term. State v. Lee, 114 N. C. 844, 19 S. E. 375, citing State v. Skidmore, 109 N.

C. 797, 14 S. E. 63; State v. Flowers,109 N. C. 841, 845, 13 S. E. 718.

26. State v. Melvin, 166 Mo. 565, 66 S. W. 534.

27. Parker v. Commonwealth, 12 Bush. (Ky.) 191, decided under a statutory provision that where an indictment was quashed a new indictment might be found by the grand jury of the county to which the cause was removed. Ky. Gen. St., Art. 4, ch. 12, § 7; Jennings v. Commonwealth, 13 Ky. Law Rep. 79, 16 S. W. 348.

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a change of venue has been granted and the indictment is subsequently quashed a new indictment may be found by the grand jury of the county to which the cause is removed is not violative of "the ancient mode of trial by jury," nor does it operate to deprive a citizen of his life, liberty or property in a mode unknown to "the law of the land." And a change of venue and the transfer of the first indictment to another county does not prevent the grand jury of the county in which the offense was committed from finding a second indictment against the accused. 29

- § 112. Same subject—What plea alleging pendency of another indictment should state.—Under a statute providing that the indictment first found shall be deemed suspended by the second indictment and shall be quashed, it has been decided that a plea alleging the pendency of another indictment should state that the indictment pleaded to was the one first found and should state that the offense charged in the two indictments is not only the same offense, but is the same matter, the same transaction, the una et eadem res acta. 30
- § 113. Indictment against several may be found true as to one.—An indictment against several persons may be found true as against one or more and rejected as to the others and this is

28. Parker v. Commonwealth, 12 Bush. (Ky.) 191.

Compare ex parte Slater, 72 Mo.

29. State v. Billings, 140 Mo. 193, 41 S. W. 778, wherein the court said: "While the circuit court of Butler county had jurisdiction of the cause which had been transferred to it, that fact in nowise prevented the grand jury of Bollinger county from finding a new indictment. As to the complaint that by permitting a second indictment to be found in the county where the crime was committed a party may be deprived of the right to a change of venue at the mere ca-

price of the prosecuting attorney, it is sufficient to say that if the original cause for change of venue still exists he may renew his application." Per GANTT, J.

30. Austin v. State, 12 Mo. 393, decided under art. 4, § 4, pp. 867-8, Dig. 1845, providing, "If there be at any time pending against the same defendant two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed suspended by such second indictment, and shall be quashed."

declared to be true though there be but a single count.<sup>31</sup> So where an indictment against the accused and two others was endorsed "not found" as to the two and "a true bill" as to the accused it was held that this afforded no ground of complaint and that a motion in arrest of judgment, based on such finding, was properly denied.<sup>32</sup>

- § 114. Different offenses in same indictment.—Different offenses, where they are of the same general character, may, in the absence of a statute to the contrary, be included in the same indictment.<sup>33</sup> So in a case in New York it is decided that offenses although differing from each other and varying in the punishments authorized to be inflicted for their perpetration, may be included in the same indictment, and the accused tried upon the several charges at the same time, provided that the offenses be of the same character, and differ only in degree, as for instance the forging of an instrument, and the uttering and publishing it, knowing it to be false.<sup>34</sup> Where, however, it is provided by statute that an indictment shall charge but one offense, there must be a compliance therewith and different offenses cannot be joined in the same indictment.<sup>35</sup>
- § 115. Different offenses in different indictments.—Two indictments may be found against a person for offenses which differ in their elements though both relate to or arise out of the same act or transaction.<sup>36</sup> But a state cannot split up a crime and
- 31. State v. Wilhite, 11 Humph. (Tenn.) 602.
- 32. State v. Aucoin, 50 La. Ann. 49, 23 So. 104.
- 33. Ball v. State, 48 Ark. 94, 2 S.W. 462.
- **34.** People v. Rynders, 12 Wend. (N. Y.) 425.
- 35. Ball v. State, 48 Ark. 94, 2 S. W. 462.
- 36. State v. Hall, 50 Ark. 28, 6 S. W. 20, case of indictment for carrying a weapon and for murder; State

v. Michel, 111 La. 434, 35 So. 629, case of indictment for attempt to commit a crime and for having committed the crime. The court said in this case: "The charges were not absolutely similar. The defendant was without right to insist upon his demurrer to quash the indictment on this ground." Per Breaux, J. People v. Rynders, 12 Wend. (N. Y.) 425, holding that an indictment for forging a check on a bank in the name of A. B. is not superseded by

prosecute it in parts. If a person is indicted and prosecuted for any part of a single crime a further prosecution is thereby barred upon a whole or a part of the same crime.<sup>37</sup>

§ 116. Same subject—Rules illustrated.—In the case of a person indicted for the larceny of several articles, if a verdict is rendered as to a part only of the offense or items charged and is silent as to the residue, it is held that the conclusion arises that the jury intended to acquit as to such residue.38 So in a case in Kentucky it has been declared that "where a party in the same transaction, with one and the same intent has committed at the same time and place, two or more acts in respect to the property of the same individual, for either or all of which together an indictment for larceny might be maintained, at the election of the prosecuting power, but in respect to which a second indictment could not be maintained without reproducing the same evidence of intent and other material facts which had been in issue upon the former trial, an acquittal in the one case is a sufficient bar to a prosecution in the other."39 And in such a case, where a new trial is granted, the first indictment being good, he cannot be subsequently indicted for the larceny of those articles in respect to which he was ac-

an indictment subsequently found, charging the same party with personating A. B., and in such assumed character receiving a sum of money, although the money be alleged to have been received from the same individual alleged in the first indictment to have been defrauded by means of the check; and the amount thereof corresponds with the sum received by means of the check. see Peake v. Van Horne, 8 Barb. (N. Y.) 158, wherein it is said: regard it as the duty of the court to discountenance the practice of finding two or more indictments for different degrees of the same offense, or for different offenses founded on the same matter." Per PAIGE, J.

37. Jackson v. State, 14 Ind. 327.

The decisive test is whether the same testimony will support both charges. State v. Johnson, 12 Ala. 840.

38. Foster v. State, 88 Ala. 182, 7 So. 185.

39. Fisher v. Commonwealth, 1 Bush. (Ky.) 211, 89 Am. Dec. 620, so holding where, by the same act, a person took a horse, wagon and harness, and two indictments were found, one for stealing the horse and the other for stealing the wagon and harness, and the accused was acquitted on the trial for stealing the horse.

quitted and can only be tried on the second indictment for the larceny of those articles for which he was found guilty.<sup>40</sup> In the application of the general rule, it is decided that the uttering as true of a forged mortgage and a forged note, which the mortgage purports to secure, at one time and to the same party, is a single act and constitutes only one offense.<sup>41</sup> So where the sale of three lottery tickets was of such a character as to constitute but one selling, as where they were sold to one person, at one time, and were all attached together by the paper on which they were printed, it was decided that the offense could not be split up so as to support three indictments, but that only one indictment could be supported.<sup>42</sup> And where a person who was in possession of two counterfeit plates was indicted for the possession of one of them and acquitted, it was decided that there should be no trial of an indictment charging possession of the other.<sup>43</sup>

§ 117. Effect of action by grand jury—Right to reconsider.—When a grand jury has acted upon a bill submitted to them and it has been returned by them into court either a true bill or not a true bill, such action is final so far as their powers are concerned in respect to that particular bill, and it is a general rule that in such a case the action so taken can not be affected by any subsequent reconsideration of the matter by the grand jury of their own volition and without authority from the court to that effect. So in a case in North Carolina it is decided that the grand jury, having once acted upon a bill and returned it publicly into court, not a true bill, and a record having been made of its finding, it is a final disposition of that bill.<sup>44</sup> And in a case in Alabama it

40. State v. Clark, 32 Ark. 231, holding that such acquittal was a perpetual bar, of which he could not be deprived by the action of the court in quashing the first indictment on which he was tried, after the second was found.

41. State v. Moore, 86 Minn. 422, 90 N. W. 787, 61 L. R. A. 819, holding that a conviction on an indict-

ment for uttering the mortgage was a bar to a subsequent conviction on another indictment for uttering the note.

42. Fontaine v. State, 6 Baxt. (Tenn.) 514.

**43**. United States v. Miner, 26 Fed. Cas. No. 15,780, 11 Blatchf. 511.

44. State v. Brown, 81 N. C. 568, wherein it is declared that Mr.

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has been determined that the functions and powers of the grand jury as to a bill of indictment are ended when the presentment is made and the indictment or true bill is received by the court. And it was decided in this case that when a defendant is put on trial under an indictment regularly preferred against him, evidence that the grand jury which preferred the indictment, and which is still in session, have reconsidered their action in preferring the bill and have ordered it to be withdrawn, is immaterial and palpably irrelevant. So in Pennsylvania it has been decided that when a defendant has been once discharged on a return of "ignoramus," a new bill sent up without a fresh hearing and without the leave of court should be promptly quashed in the absence of affirmative proof that the course taken was required to meet some grave emergency or provide for some public need. As

§ 118. Same subject—Qualification of rule.—The rule stated in the preceding section is not to be extended so as to preclude a grand jury from reconsidering a matter which has been submitted to them in those cases where no return has been made by them. The fact that a bill has been considered and a vote taken should not of itself be regarded as exhausting their powers and as pre-

Blackstone holds that where a bill has been returned not a true bill, or not found, the party is discharged without further answer, but that a fresh bill may afterwards be preferred to a subsequent grand jury. 4 Bl. Com. 305.

**45.** Fields v. State, 121 Ala. 16, 25 So. 726.

46. Rowland v. Commonwealth, 82 Pa. St. 405, referred to as stating a recognized principle in Commonwealth v. Whitaker, 25 Pa. Co. Ct. 42, wherein it is held that when the court is asked to set aside the findings of a grand jury, or ignore its action, and submit to another grand jury matters once regularly passed

upon, an adequate reason for so doing should accompany the Judge Criswell said in this latter case, in referring to the grand jury: "The fact that they sit and deliberate privately renders it impossible for the court to control, direct and review their proceedings, as they may those which are had in their presence, and the fact that from time immemorial they have so sat and deliberated, may be taken as conclusive of the fact that it is not and never was intended that the court should so direct, control and review their proceedings."

See, also, Commonwealth v. Priestly, 24 Pa. Co. Ct. 543.

venting a subsequent consideration of the same matter. It is the duty of the grand jury to thoroughly investigate and consider every charge submitted to them and the fact that they may, at some time in the course of their proceedings, have reached a conclusion should not be regarded as preventing them from again considering the same matter and arriving at a different conclusion, where the result first reached has not assumed the character of a return of the bill into open court. So the fact that the grand jury at some time during their determination voted not to find a bill against the accused, and after having so voted, reconsidered their determination and voted to find a bill, and this was done, so far as appeared, without any new evidence being presented to the grand jury subsequent to their vote not to find a bill, was held to furnish no ground for quashing the indictment.47 similar conclusion was reached in a case in New York. 48 in a case in Oregon it is decided that, in discharge of the obligations which grand jurors assume by their oaths, that they will make a true presentment or indictment of all crimes committed or triable within their county that shall come to their knowledge, they not only have the right, but it is their duty, to return a new indictment against a defendant, if, in their opinion, the former indictment, which is still pending and undisposed of, is defective or insufficient, unless some proceeding has been had which amounts to a bar to further prosecution. 49 But in an early case in Massachusetts it was decided that where a trial had been commenced, and it was then discovered that the indictment was not

47. United States v. Simmons, 46 Fed. 65. Judge BENEDICT said: "It was the right of the grand jury to reconsider their vote without taking additional testimony, certainly before any report by the jury to the court, and while the matter was still before them."

48. People v. Sheriff, 11 N. Y. Civ. Proc. R. 172. It was said in this case: "The law gives the jury full control of every change until it is finally discharged, and during the

same session it may reconsider its own actions, and the law contemplates that the jury shall give each case a full and complete investigation before it finally comes to a conclusion." Per SMITH, J.

49. State v. Reinhart, 26 Oreg. 466, 38 Pac. 822, wherein it is declared that this is the better and more usual practice and citing Perkins v. State, 66 Ala. 457; Stuart v. Commonwealth, 28 Grat. (Va.) 950.

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signed by the foreman of the grand jury, and the indictment was withdrawn from the jury, they could not find another bill against the same persons, for the same offense, without the authority of the court.50

§ 119. Power of court to resubmit bill to grand jury.— The power of the court to resubmit an indictment which is defective or imperfect, to the same grand jury, is recognized. "The grand jury are under the control of the court. And it is the province and duty of the court to see that the finding is proper in point of law; and if not, the court may recommit an improper or imperfect finding, and may, if necessary, exercise the power of compelling a proper discharge of duty, on the part of the grand jury."51 So it is said in a recent case in Iowa that it is competent for the trial court to order the resubmission of a criminal charge to the grand jury where the indictment is clearly defective.<sup>52</sup> In the exercise of this power the court may recommit an indictment to a grand jury for amendment,53 and the power of the court to quash an indictment in certain cases and to order that the charge be resubmitted to the same or to another grand jury has also been sanctioned. So where it appeared that there was such an irregularity in the selection and composition of the grand jury, who returned the indictment, as would cause a reversal of the judgment after verdict, if rendered against the accused, it was held proper to stop the trial, quash the indictment, and order the case to be resubmitted for consideration to another grand jury.54

50. Commonwealth v. Sargent, Thach. Cr. Cas. (Mass.) 116.

51. State v. Cowan, 1 Head. (Tenn.) 280. Per McKinney, J., citing Arch. Cr. Pr. 98 to 104, note 5.

An indictment may be withdrawn, by leave of the court, and recommitted to the grand jury, by whom it has been found, and returned into court, but when returned into court again the record should show the fact. State v. Davidson, 2 Cold. (Tenn.) 184.

52. State v. Hanlin (Iowa, 1907), 110 N. W. 162, citing State v. Kimble, 104 Iowa, 19, 73 N. W. 348.

53. A motion to recommit an indictment for amendment need not mention the proposed amendment. Lawless v. State, (Tenn.), 173.

54. Weston v. State, 63 Ala. 155.

§ 120. Resubmission of charge where no indictment found—Limitation on power.—Although it is a generally accepted rule that, unless it is provided to the contrary by statute, a charge which has been ignored by one grand jury, or in respect to which it has returned "not a true bill," may be again submitted to and considered by another grand jury, 55 yet it is said that the

Judge Manning said: "It would have been wrong for a circuit judge, seeing that defect, to have suffered the trial to proceed to a judgment, which would have here been certainly vacated. Lex neminem cogit ad vana seu inutilia. Nor can it be held, in such a case, that the proceedings have gone so far that defendant had been put in jeopardy, and should not, therefore, be subjected to trial again. A defendant is never in jeopardy, when the indictment against him is so invalid that a judgment upon it would be annulled on appeal, no matter what may be the stage of the prosecution when, for that reason, it is quashed."

States v. Martin, 50 Fed. 918, wherein it is said: "The doctrine in this State, and the other American States, is that the ignoring of an indictment by one grand jury is no bar to a subsequent grand jury investigating the charge and finding an indictment for the same offense." Per Paul, J.

Georgia.—Christmas v. State, 53 Ga. 81, holding that the finding of "no bill" by two successive grand juries, on a bill of indictment for a crime, does not entitle a person to judgment of acquittal or a discharge from the crime, and it was decided that the judge properly refused to allow an order discharging the defend-

ant "from the offense or crime therein contained."

Missouri.—State v. Renfrow, 111 Mo. 585, 20 S. W. 304, wherein it was declared that "neither the mere finding, or refusal to find, an indictment by one grand jury will affect the power of another grand jury to indict." Per Gantr, J.

Nevada.—Ex parte Job, 17 Nev. 184, 30 Pac. 699, holding that the failure of three grand juries to find an indictment did not operate as a bar to further prosecution, and that a fourth grand jury might find an indictment for the same charge.

North Carolina.-State v. Harris, 91 N. C. 656, holding that where a bill of indictment is ignored, a new bill, charging the defendant with the same offense, may be sent to the same grand jury, with the names of other witnesses endorsed thereon. court said in this case: might be a variety of reasons why a new or fresh bill should be sent, as that the jury might have failed upon the first bill to examine the witnesses properly, and elicit all the facts; or, they might have misapprehended the character of the evidence, which they could understand and appreciate after some explanation of it by the court in a proper case; or, new evidence might be produced; and, indeed, it is easy to conceive of a case power which is vested in the court to order such a resubmission should be exercised with a considerable caution. So it is declared in this connection in a case in New York that "while the court has power to permit the charges to be again submitted to the grand jury such power should be sparingly and discriminatingly used. It is a practice that ought not to be encouraged, nor granted proforma. The court should act judicially, and permit such resubmission only when facts are presented which justify such action."

in which it might be of great moment to society, and a due administration of public justice, that a new bill should be promptly sent. may be said that if a second bill can be sent in such a case, so may a third and fourth, under like circumstances; and thus the accused might greatly harrassed and oppressed. is not to be presumed that the prosecuting officer would needlessly multiply bills for the same offense, much less that he would so prostitute his office to gratify his own malice or that of others. He would be amenable for such an offense, and, besides, the grand jury might refuse to act upon bills thus sent, and complain to the court; and upon proper application the court would promptly interpose a wholesome check." Per MERRIMON, J.

"If a man be committed for a crime, and no bill be preferred against him, or if it be thrown out by the grand jury, so that he is discharged by proclamation, he is still liable to be indicted, though the sending up a second bill, after an ignoramus, is an extreme act of prerogative, subject to a revision of the court." Wharton Cr. Pl. and Pr., § 446, quoted in United States v. Martin, 50 Fed. 918.

56. People v. Neidhart, 35 Misc. R. (N. Y.) 191, 71 N. Y. Supp. 591, 15 N. Y. Cr. R. 475, holding that the court will not direct that a change be resubmitted merely on the affidavit of the district attorney that he is of the opinion that the grand jury misunderstood the law, and that if the charge is again submitted an "indictment may be found." FOSTER said as to this: "To permit the district attorney, because he does not agree with the grand jury, and seemingly for no other reason, to continue resubmitting complaints other grand juries until one can be found to agree with him, is to place in his hands a power of persecution which I am unwilling to sanction, and which I am quite sure he does The verdict or decision not desire. of the grand jury is justly entitled to great weight and should not be lightly brushed aside or ignored."

An adequate reason should be shown where it is sought to refer a matter to another grand jury in respect to which a former grand jury has refused to return an indictment. Commonwealth v. Whitaker, 25 Pa. Co. Ct. R. 42. See Commonwealth v. Priestly, 24 Pa. Co. Ct. R. 543, 10 Pa. Dist. R. 217.

§ 121. Same subject—Statutory provisions may control.—In some States the question as to again submitting a charge to the grand jury after it has once been passed upon by them is regulated by statute, permitting the court to again submit a charge.<sup>57</sup> And in a case in Arkansas it is decided that where one held for murder is indicted for murder in the second degree upon evidence that warranted an indictment in the higher degree, the Circuit Court may, before trial, suspend proceedings under such indictment and commit accused to jail without bail to await the action of the next grand jury.<sup>58</sup>

§ 122. Where order of resubmission uncertain.—If an order of resubmission as primarily entered was uncertain, and it could have been certain, it will be presumed to have been so made by the subsequent direction of the court.<sup>59</sup>

57. State v. Collis, 73 Iowa, 542, 35 N. W. 625; Iowa Code, § 4290, providing that "such dismissal of the charge does not prevent the same from being again submitted to the grand jury, as often as the court may direct; but without such direction it cannot again be submitted." Sutton v. Commonwealth, 97 Ky. 308, 30 S. W. 661; Ky. Crim. Code, § 116, providing that: "The dismissal of the charge does not prevent it being again submitted to a grand jury, as often as the court may direct, but without such direction it cannot again be submitted." People v. Warren, 109 N. Y. 615, 15 N. E. 880, N. Y. Code of Cr. Proc., § 270, which is similar to above provisions.

58. Ex parte Johnson, 71 Ark. 47, 70 S. W. 467, decided under sections of Code of Criminal Procedure found in Sand. & H. Dig., §§ 2060, 2061, 2249. The last of these sections permitted the court, after trial commenced when it appeared from the

facts proved that the defendant was guilty of a higher crime than that charged in the indictment, to discharge the jury and suspend the proceedings until the case could be submitted to another grand jury, and it also provided that in the meantime the court might commit the defendant or admit him to bail, as the court deemed proper under the circumstances.

59. Ex parte Job, 17 Nev. 184, 30 Pac. 699. The order in this case recited that the court was of opinion that the objection upon which the demurrer was allowed could be avoided in a new indictment, and that, therefore, he directed the charge to be resubmitted "to the same or another grand jury." It was said by the court in this connection: "The statute (§ 1818, Comp. L.) makes it obligatory upon district courts upon the impaneling of grand juries to charge them as to the nature of their duties, and to draw their attention to any

# §§ 123, 124 Finding and Return of Grand Jury.

- § 123. Finding of grand jury cannot be varied by extrinsic evidence—General rule.—It may be stated as a general rule that an indictment when properly presented and filed is a record which imports verity and cannot be varied, contradicted or impeached by parol or extrinsic evidence. So it has been decided that it is not competent to add to or explain an indictment by the contents of a paper which forms no part of it, and which is not provided for by law. And one who is being tried for the offenses charged in an indictment will not be permitted to show by extrinsic evidence that such offenses were not the ones which the grand jury actually had in mind when they found the indictment.
- § 124. Same subject—As to evidence on which indictment found.—The question as to the conclusiveness of the finding of the grand jury in respect to the evidence upon which the indictment is found is one upon which the courts are not fully in harmony. Some of the cases, however, which are apparently in conflict will be found upon closer examination not to be at variance with each other and many cases which are sometimes referred to as asserting that the finding of the grand jury is conclusive and cannot be contradicted or impeached go merely to the method of procedure to establish the fact that the indictment was found upon no evidence or illegal evidence. In this connection it has been decided in a

changes for public offenses returned to the court. or likely to come before them. It was, therefore, the duty of the court, in charging the next grand jury, to have directed their attention to the petitioner's case. The record does not affirmatively show that this was done, but since it was embraced within the court's duties, we must, in the absence of a showing to the contrary, presume that the court gave the charge required by law." Per Bel-KNAP, J.

60. People v. Hulbut. 4 Den. (N.
 Y.) 133, 47 Am. Dec. 244.

61. State v. Brownlee, 84 Iowa, 473, 51 N. W. 25, holding that a writing filed by the county attorney conceding a certain fact in connection with the crime charged was not admissible for the purpose of a demurrer to the indictment.

62. State v. Skinner, 34 Kan. 256, 8 Pac. 420, holding that the defendants could not show this either by testimony of the county attorney or of any witness before the grand jury.

See, also, State v. Schmidt, 34 Kan. 399, 8 Pac. 867.

case in North Carolina that there is a presumption in favor of the legality of the finding of the jury, but that where the accused establishes the fact that the bill was found without evidence or upon illegal evidence, it may be quashed or the matter pleaded in abatement. 63 And in a case in Oklahoma it is decided, where a defendant files a motion to set aside and quash an indictment on the grounds that it is found by a grand jury, without legal and competent evidence, but upon hearsay testimony, and makes application to the trial court to set a day for the taking of testimony as to the matters alleged in said motion and for the subpoena of witnesses therefor, in accordance with the statute, that it is reversible error to summarily overrule said motion and to proceed with the indictment.64 And in a case in Alabama it is declared that objections on the ground that an indictment was found upon no evidence or without legal evidence are available by timely motion to quash, or to strike the paper from the file, which it is said the court should always grant, if satisfied by the evidence, beyond a reasonable doubt, that the grounds of the motion are true, and that there has been no lack of diligence in ascertaining the facts, and bringing them to the attention of the court."65 similar doctrine is asserted in a case in Minnesota. 66 In Georgia it has been decided in this connection that a motion to quash an indictment on such a ground should be denied where no evidence is offered to sustain the motion.67

§ 125. Same subject continued.—In an early case in New York, which is sometimes referred to as supporting the doctrine that the finding of the grand jury is conclusive, it is decided that a grand juror cannot be called to impeach the conduct of the jury as, for example, to show that an indictment presented by them was found without testimony, or upon insufficient testimony. In this case, however, the court declared that while a timely motion

<sup>63.</sup> State v. Lanier, 90 N. C. 714.

**<sup>64</sup>**. Royce v. Territory, 5 Okla. 61, 47 Pac. 1083.

<sup>65.</sup> Sparrenberger v. State, 53 Ala.481, 25 Am. Dec. 643. Per Brickell,C. J.

<sup>66.</sup> State v. Froiseth, 16 Minn. 96. See § 103 herein.

**<sup>67</sup>**. O'Shields v. State, 92 Ga. **472**, 17 S. E. 845.

<sup>68.</sup> People v. Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244, holding

to quash or set aside the indictment might possibly have been granted the proper course would have been by a motion to set aside the record. In this case, which is sometimes referred to as supporting the doctrine that the finding of the grand jury cannot be contradicted or impeached, the court said: "The indictment. when presented in due form by the grand jury, and filed in court, is a record; and, like other records, imports absolute verity. cannot be impeached unless it be done upon motion, by showing that it was not founded upon sufficient evidence, or that there was any fault or irregularity in the proceedings. It can neither be done by plea averring against the record, nor by evidence on the trial. . . . So long as the record remains, no defect in the evidence upon which it was founded, nor any irregularity in the proceedings, however great, can furnish any answer to it. when the ends of justice require it, a record may be set aside on motion; and when set aside, that is an end of it. If the defendant, instead of pleading and going to trial on the indictment, had moved to quash or set it aside, or to strike out the first four counts, it is possible that the motion would have been granted. But that is a question on which I do not intend to express any opinion. On the trial neither the court nor the jury could have anything to do with the proceedings in the grand jury room. Their only office was to inquire whether the defendant was guilty of the offenses laid to his charge." 69

§ 126. Same subject concluded.—In an early Connecticut case it was determined that it is the policy of the law, in the furtherance of justice, that the preliminary inquiry before a grand jury should be conducted in secret and that no evidence will be received, for the purpose of vitiating an indictment either from the grand jurors or from the witnesses before them, or from any other person required by law to be present, as to the evidence given

where, on the trial of an indictment for selling liquor without a license, which charged five offenses, in separate counts, the defendant, in order to limit the proof to a single count, offered to show by one of the grand jury that only one offense was sworn to before that body, that the evidence was inadmissible.

69. Per Bronson, J.

on such inquiry.<sup>70</sup> And in New Jersey it is decided in an early case, that the defendant cannot show by a plea in abatement or otherwise, that the indictment was founded on illegal evidence or without evidence. 71 It will be seen from an examination of the cases in this and the preceding sections,72 that there is a conflict between the authorities as to the conclusiveness of the finding of the grand jury where it is sought to show that the indictment was . founded upon no evidence or upon illegal evidence. thorities seem to be about equally divided in their views. determining this question, however, an important and controlling element is the nature of the right to an indictment and its object. This right was given in order to secure to the individual a fair and impartial investigation of the alleged offense by a grand jury. It was to secure a person against the disgrace of an indictment and the expense of a trial upon a charge which was without foundation, and it presupposed a fair investigation of the charge against him,

70. State v. Fasset, 16 Conn. 458. 71. State v. Dayton, 23 N. J. L. 49, 53 Am. 270, wherein it is "To permit every defendant said: to question the competency and qualification of every witness before the grand jury would lead to the obstruction of the administration, if not the defeat, of the ends of justice; and to make the right at all valuable the doors of the grand jury room must be thrown open, and the defendant permitted to scrutinize not only the evidence upon which he is to be tried but also the evidence upon which he was indicted." Per the Chief Justice.

And a similar doctrine is asserted in other cases. Smith v. State, 61 Miss. 754; Turk v. Smith, 7 Ohio (Part 2), 240; State v. Boyd, 2 Hills' L. (S. C.) 288, 27 Am. Dec. 376n, wherein Judge HARPER said: "I am of the opinion that the court will, in no instance, inquire into the character of the testimony which has influ-

enced the grand jury in finding an indictment with a view to the quashing of the indictment."

That indictment founded entirely on incompetent evidence is not a ground for quashing it. State v. Woodrow, 58 W. Va. 527, 52 S. E. 545.

See Mercer v. State, 40 Fla. 216, 24 So. 154, wherein the court said, in reference to an objection that a second indictment was found without the re-examination of any witnesses, or taking of any testimony except such as was heard on the finding of the first indictment, "the rule is that a court, for the purpose of quashing an indictment, will never inquire into the character of the evidence that influenced a grand jury in finding such indictment." Per TAY-LOR, C. J., citing State v. Boyd, 2 Hill's L. (S. C.) 288, 27 Am. Dec.

72. See §§ 124, 125 herein.

and that an indictment should only be found after the consideration of evidence sufficient to warrant it. Having in view these facts, it would seem that a defendant might by timely motion to quash or by a plea in abatement, show that the indictment was founded on illegal evidence or was returned without any evidence to sustain it. By this latter is not meant a mere insufficiency of evidence where there was any legal evidence to sustain the finding, for it would seem that where it appears that there was legal evidence before the grand jury, any inquiry into its sufficiency should not be allowed.<sup>73</sup>

73. Sparrenberger v. State, 53 Ala. 481, 25 Am. Dec. 643, wherein Chief Justice Brickell said: "It is scarcely necessary to say that when it appears witnesses were examined by the grand jury, or the jury had before them legal documentary evidence, no inquiry into the sufficiency of the evidence is indulged."

See Stewart v. State, 24 Ind. 142;

Commonwealth v. Taylor, 12 Pa. Co. Ct. 326.

That one of the witnesses was incompetent is not a sufficient ground for setting aside an indictment. See State v. Tucker, 20 Iowa, 508; State v. Logan, 1 Nev. 509; Dockery v. State, 35 Tex. Cr. 487, 34 S. W. 281; United States v. Utah, 5 Utah, 608, 19 Pac. 145.

### CHAPTER VI.

#### RECORD OF INDICTMENT.

- Section 127. Record should identify indictment.
  - 128. Record should show return into court; general rule.
  - 129. Same subject; record entry of return not necessary.
  - 130. Presumptions as to return.
  - 131. Indictment need not appear on record in extenso.
  - 132. Copying of indorsement not necessary.
  - 133. Filing and indorsement of.
  - 134. As to jurisdiction of court.
  - 135. As to organization and qualification of grand jury.
  - 136. As to swearing of grand jury.
  - 137. As to names of grand jurors.
  - 138. As to offense charged.
  - 139. Record need not show indictment on testimony duly sworn.
  - 140. Of indictment against two or more persons.
  - 141. Filing away of indictment; reinstatement of.
  - 142. Omissions supplied by reference to other parts of record.
  - 143. Amendment of record; nunc pro tunc entries.
  - 144. Same subject continued.
  - 145. Power of court to supply record; lost indictment.
  - 146. Same subject; statutory provisions affecting.
  - 147. Same subject; after arraignment or trial.
  - 148. Where indictment found after substitution.
- § 127. Record should identify indictment.—The record in a criminal prosecution upon indictment should identify it by some entry from the record of the lower court, describing it by the time of its filing and its number, or otherwise.¹ The entry should be of such a character as to identify the indictment upon which the prisoner is tried as the one which was found and returned by the grand jury.² But where it affirmatively appears that the in-
- 1. Springer v. State, 19 Ind. 180, declaring that on the return of indictments the clerk should enter that the grand jury return into court the following bills of indictment, which
- are now marked 1, 2, 3, etc., or lettered A, B, C, etc. Cruiser v. State, 18 N. J. L. 206.
- 2. Cornwell v. State, 53 Miss. 385; Hogue v. State, 34 Miss. 616.

dictment, set out in the transcript, was returned into court, and that the appellant appeared and pleaded to the indictment returned it is immaterial that the number on the indictment and the number of the cause are different.<sup>3</sup>

§ 128. Record should show return into court—General rule.

—After a grand jury is satisfied of the truth of an accusation and it is indorsed a true bill, it should then be publicly returned into court,<sup>4</sup> and it is essential that the record should show that it was

- Mergentheim v. State, 107 Ind.
   8 N. E. 568.
- 4. 4 Black. Comm. 306. See, also, the following cases:

United States.—United States v. Butler, Fed. Cas. No. 14,700.

Alabama.—Mose v. State, 35 Ala. 421.

Arkansas.—Holcomb v. State, 31 Ark. 427.

Colorado.—Thornell v. People, 11 Colo. 305, 17 Pac. 904; Board of County Commissioners v. Graham, 4 Colo. 201.

**Florida.**—Goodson v. State, 29 Fla. 511, 10 So. 738.

**Georgia.**—Sampson v. State, 124 Ga. 776, 53 S. E. 332.

Illinois.—Yundt v. People, 65 Ill. 372; Gardner v. People, 20 Ill. 430; Rainey v. People, 3 Gilm. 71.

Indiana.—Cooper v. State, 79 Ind. 206.

Louisiana.—State v. Mason, 32 La. Ann. 1018.

Missouri.—State v. Vincent, 91 Mo. 662, 4 S. W. 430.

North Carolina.—State v. Bordeaux, 93 N. C. 560.

In this connection it is said in an early case in Virginia: "The bill of indictment is sent or delivered to the grand jury, who, after hearing all

the evidence adduced by the Commonwealth, decide whether it be a true bill or not. If they find it so, the foreman of the grand jury endorses on it, 'a true bill,' and signs his name as foreman, and then the bill is brought into court by the whole grand jury, and in open court it is publicly delivered to the clerk, who records the fact. It is necessary that it should be presented publicly by the grand jury; that is, the evidence required by law to prove that it is sanctioned by the accusing body, and until it is so presented by the grand jury, with the endorsement aforesaid, the party charged by it is not indicted, nor is he required, or found, to answer to any charge against him which is not so pre-Commonwealth v. Cawood. 2 Va. Cas. 527, 541. Per Brocken-BROUGH, J.

Return of indictment; unconstitutional law as to time of holding court.—An indictment returned at a time fixed for holding court by a law which has been declared to be unconstitutional is void, and there being no valid indictment which will support a judgment of conviction, it necessarily follows that a judgment of conviction on such an

so returned.<sup>5</sup> So in a case in Florida it is decided that the only recognized manner in which the findings of a grand jury can be

indictment will not support an appeal. McDaniel v. State (Ala., 1905), 39 So. 919, citing Walker v. State, 142 Ala. 7, 39 So. 242.

Arkansas.—Holcomb v. State,
 Ark. 427; Green v. State, 19 Ark.
 178.

Colorado.—Thornell v. People, 11 Colo. 305, 17 Pac. 904.

**Florida.**—Goodson v. State, 29 Fla. 511, 10 So. 738; Collins v. State, 13 Fla. 651.

**Georgia.**—Bowen v. State, 81 Ga. 482, 8 S. E. 736.

Illinois.—Yundt v. People, 65 Ill. 372; Sattler v. State, 59 Ill. 68; Kelly v. State, 39 Ill. 157; Gardner v. People, 20 Ill. 430; Rainey v. People, 3 Gilm. 71.

Indiana.—Waterman v. State, 116 Ind. 51, 18 N. E. 63; Jackson v. State, 21 Ind. 79; Springer v. State, 19 Ind. 180; Conner v. State, 18 Ind. 428.

Iowa.—State v. Glover, 3 Iowa, 249.

Louisiana.—State v. Pitts, 39 La. Ann. 914, 3 So. 118.

Mississippi.—Pond v. State, 47 Miss. 39.

Tennessee.—State v. Herron, 86 Tenn. 442, 7 S. W. 37; Bennett v. State, 8 Humph. 118; Henry v. State, 4 Humph. 270; Hite v. State, 9 Yerg. 198; State v. Willis, 3 Head. 157.

Texas.—Walker v. State, 7 Tex. App. 52.

Virginia.—Simmons v. Commonwealth, 89 Va. 156, 15 S. E. 386.

West Virginia.—State v. Heatton, 23 W. Va. 773; State v. Gilmore, 9 W. Va. 641.

A judgment against a defendant will be reversed where there is no evidence in the transcript, either by entry of record or by endorsement upon the indictment that the grand jury returned the indictment into court.

Arkansas.—McKenzie v. State, 24 Ark. 636.

Illinois.—Kelly v. People, 39 Ill. 157; Rainey v. People, 8 Ill. 71.

Iowa.—State v. Glovey, 3 Iowa, 249.

Mississippi.—Jenkins v. State, 30 Miss. 408.

Tennessee.—Brown v. State, 7 Humph. 155.

Virginia.—Commonwealth v. Cawood, 2 Va. Cas. 527.

The correctness of the finding of the court below that an indictment was regularly presented will be presumed, and the fact that it was presented and filed after the adjournment of the court cannot be established by affidavits. State v. Gibbs, 39 Iowa, 318.

An affidavit and information need not be filed in open court. Stefani v. State, 124 Ind. 3, 24 N. E. 254.

Fact of appointment of foreman need not be entered on minutes. People v. Roberts, 6 Cal. 214.

Failure to record before last day of term, as provided by statute, not ground for quashing an indictment which was presented and filed on such day and subsequently recorded. Courtney v. State, 5 Ind. App. 356, 32 N. E. 335.

authoritatively presented is in open court, and that such presentment should be affirmatively shown by a record entry in the minutes of the court, or else by the file indorsement on the indictment itself by the clerk of the court, showing that it was presented by the grand jury and filed in open court. And it was further held that the record entry in the minutes is the best and proper evidence of the fact.<sup>6</sup> And a motion in arrest of judgment will be sustained where the record fails to show that an indictment has been returned into court.<sup>7</sup>

Where statute forbids entry on record under certain conditions. Where it is provided by statute that the clerk shall make no entry on the minutes or records in reference to an indictment against one who is not in actual custody, such indictment is not invalidated by a failure to enter on the record that it was filed on the day it was presented, or by other defects as to details. State v. Bell, 159 Mo. 479, 60 S. W. 1102.

Entry of an order for the discharge of jury before entering the title of the case against one indicted is not material and does not affect the validity of the indictment where it appears from the minutes of the court that the indictment was returned and presented in court prior to the discharge of the jury. State v. Starr, 52 La. Ann. 610, 26 So. 998.

Two courts and grand juries in same county.—In a late case in Texas it is decided that an objection that an indictment is not shown to have been returned into the proper court, where there are two district courts in a county, each entitled to a grand jury, because the distinguishing number of the court in which the

indictment was presented is not shown, is not sustained where it appears that the presiding judge of the court in which the indictment was presented was the one who presided in the court in which the case was tried. Outley v. State (Tex. Cr. App. 1907), 99 S. W. 95.

Sufficiency of record of return in particular cases see:

**Alabama.**—Parnell v. State, 129 Ala. 6, 29 So. 860.

Illinois.—Kelly v. People, 132 Ill. 363, 24 N. E. 56.

Missouri.—State v. Sharpe, 119 Mo. App. 386, 95 S. W. 298; State v. Freeze, 30 Mo. App. 347.

New Jersey.—State v. Engeman (N. J. L.), 23 Atl. 676.

North Carolina.—State v. Ledford, 133 N. C. 714, 45 S. E. 944; State v. Starnes, 97 N. C. 423, 2 S. E. 447; State v. Guilford, 4 Jones L. 83.

Tennessee.—State v. Herron, 86 Tenn. 442, 7 S. W. 37.

6. Goodson v. State, 29 Fla. 511, 10 So. 738.

7. Kelly v. State, 39 Ill. 157; Adams v. State, 11 Ind. 304.

§ 129. Same subject—Record entry of return not necessary. -Although it is a general rule that it should appear from the record that an indictment was returned into court,8 yet there is authority for the rule that a plea in abatement is properly overruled where it appears that the indictment was actually returned into court though no specific entry of this particular fact was made on the minutes at the time.9 So it has been decided in a case in Alabama that when a written accusation is properly indorsed, and returned by the grand jury into court and filed, it becomes a valid indictment; and the obligation of the accused to answer it is not destroyed by the clerical omission of a recital upon the minutes, of the fact of the return.<sup>10</sup> And in an early case in Iowa it is held that an indorsement upon an indictment itself is sufficient record of the finding and filing of the same, and the only record which should be made until after the defendant is arrested.<sup>11</sup> And there are numerous other cases which assert the doctrine that where it appears from the record that a grand jury properly organized for a certain term of court presented against the accused during such term an indictment properly signed and endorsed as required by statute, and such indictment is marked filed by the clerk in open court, it sufficiently appears

8. See § 128 herein.

9. Chelsea v. State, 121 Ga. 340, 49 S. E. 258, holding that the failure to make such entry on the minutes was an irregularity which was cured by the testimony of the bailiff and the clerk; State v. Lord, 118 Mo. 1, 23 S. W. 764, holding that where an indictment is signed by the prosecuting attorney, foreman of the grand jury, and is indorsed "a true bill" and "filed," there is a presumption that it was returned into court in the manner and means prescribed by law, though there is no record entry that the indictment was returned into open court.

As affected by statute.—An entry of the return on the minutes is

unnecessary where it is provided by statute that the filing of the indictment by the clerks shall "be evidence of the proper and legal return into court of such indictment. Cook v. State, 57 Miss. 654.

A presentment becomes a part of the record of the court by being returned into court by the jury and filed by the clerk, without any memorandum upon the minutes of the court of these facts. State v. Muzingo, Meigs (Tenn.), 112. See Jeremy Imp. Co. v. Commonwealth (Va. 1907), 56 S. E. 224.

10. Mose v. State, 35 Ala. 421.

11. Wrocklege v. State, 1 Iowa, 167.

from the record that the indictment was properly returned into court. And such a doctrine seems in reason to be sound and not in conflict with the general rule.<sup>12</sup> And it has been decided that,

12. Alabama.—McKee v. State. 82 Ala. 32, 2 So. 451.

**Florida.**—Westcott v. State, 31 Fla. 458, 12 So. 846.

**Kansas.**—State v. Crilly, 69 Kan. 802, 77 Pac. 701.

Louisiana.—State v. Mason, 32 La. Ann. 1018.

Mississippi.—Cooper v. State, 59 Miss. 267.

North Carolina.—State v. Weaver, 104 N. C. 758, 10 S. E. 486.

Compare Commonwealth v. wood, 2 Va. Cas. 527, holding that the record must show affirmatively that indictment was found a true bill by the grand jury. This case was cited and approved as to indictments but distinguished in the case of a presentment by the grand jury in Jeremy Imp. Co. v. Commonwealth (Va. 1907), 56 S. E. 224, wherein it was held that the presentment of the grand jury being set forth in extenso in the order of the court, entered of record, and made a part thereof, this was all that was required in such a case.

Sufficiency of showing of return on record.—Where the record show that the grand jurors were sworn, and having received their charge, retired to consider the same, and under a subsequent there is a recital in the record as follows: "On this day the grand jury return to the bar, and, through their foreman, deliver the following indictment as a true bill, to wit," it sufficiently shows that the indictment

was presented by the foreman in open court. State v. Vincent, 91 Mo. 662, 4 S. W. 430. And the following entry on the record showing the return of an indictment has been held sufficient: "This day came the grand jury for the State, and filed in open court the following bill of indictment." State v. Herron, 86 Tenn. 442, 7 S. W. 37. And in a case in Indiana it is decided that "where the record recites that the grand jury came into" open court and returned the following indictment, "giving its number and setting it out, it sufficiently shows that it was returned into open court and sufficiently identifies the indictment." Willey v. State, 46 Ind. 363. And where an indictment was indorsed "a true and the indorsement was signed by the foreman of the grand jury and the indictment was duly marked "filed" by the clerk, with the date of the filing, it was held that these indorsements showed a substantial compliance with the statute requiring that the record show that the indictment had been returned to the court by and in the presence of the grand jury, and was sufficient to prove its authenticity as a record. McKee v. State, 82 Ala. 32, 2 So. 451. In Williams v. State (Ind. 1907), 79 N. E. 1079, the objection was raised that the indictment bore no evidence of having been filed in court and also that it had never been recorded in the records of Judge HADLEY said in the court.

though it is required by statute that an indictment shall be recorded, yet it is no ground for a motion to quash and in arrest that the record does not disclose that the indictment was recorded, it being declared that the failure to comply with such requirement does not injure a defendant who is tried on the indictment that was actually returned by the grand jury.<sup>13</sup>

reference to these objections and a motion in arrest of judgment based thereon: "With respect to this motion . . . it has been held by this court that, when the record recites that the indictment. upon which the defendant was arraigned and tried, was returned into open court by a regularly organized and qualified grand jury, it is sufficient to show its due return. The ruling is based upon the principle that the failure of the clerk to indorse the fact of the return, or filing, or to record the indictment, does not in any way injure the defendant, or furnish bim any valid ground for reversal. Ransbottom v. State, 144 Ind. 250, 252, 43 N. E. 218; Padgett v. State, 103 Ind. 550, 3 N. E. 377; Heath v. State, 101 Ind. 512; Mathis v. State, 94 Ind. 562; Courtney v. State, 5 Ind. App. 356, 32 N. E. 335. In this case the record recites the performance of all acts necessary to the impaneling and qualifying of a legal jury. It then proceeds, grand 'Comes now the grand jury heretofore regularly impaneled and sworn, as by the statute provided, into open court, and said grand jury, now, through their foreman, return into open court the following indictments, signed by Charles P. Benedict, prosecuting attorney, and indorsed by Thomas D. Amos, foreman, as true bills; said bills are examined in open court by the judge thereof, and filed by William E. Davis, clerk of said court, and are as follows, to wit: 35,771, State of Indiana v. George Williams, murder.' Then follows the indictment in full and then the indorsements, showing the number and title of the cause, as above. 'Record, book 33, page 421. Indictment for murder. A true bill. Thomas D. Amos, foreman.' Names of the witnesses, and signed, 'Charles P. Benedict, Prosecuting Attorney.' This record, reciting the presentment, return into open court, filing and recording of the indictment. aided by the presumptions that operate in favor of the regularity of the proceedings, must be held sufficient. especially when the defendant is unable to show, or at least does not attempt to show, that he was in any way prejudiced thereby in his substantial rights."

The indorsement "filed in open court" does not show that it was returned into court by the grand jury, and is not sufficient. McKenzie v. State, 24 Ark. 636.

13. Ransbottom v. State, 144 Ind. 250, 43 N. E. 218; Heath v. State, 101 Ind. 512, construing R. S. 1894, § 1741 (R. S. 1881, § 1672), providing that "As soon as an indictment is presented and examined by the court, or information filed, the clerk shall indorse thereon the

§ 130. Presumptions as to return.—It will be presumed that an indictment was presented to the court by the foreman of the grand jury, and in their presence, although that fact is not indorsed on it, if the record of the court shows nothing to the contrary.<sup>14</sup> And when the record states that the grand jury returned the bill in open court, it is not competent to disprove by evidence aliunde the recital in the record on a motion in arrest of judgment.<sup>15</sup> And where a bill was endorsed "A true bill" and signed by the foreman and there was an entry in the minutes that "thereupon the court ordered the finding of the bill to be recorded," it was decided that it would be presumed that the grand jury came into court in a body and presented the indictment in open court.<sup>16</sup>

date of such filing or presentation; and he shall then record such indictment or information, with its indorsements, in a record book to be kept for that purpose, and the clerk, before the last day of the term at which same are presented must compare the record with the original indictment or information and certify to the correctness thereof."

14. People v. Blackwell, 27 Cal. 65.

It will be presumed where the record of the court shows nothing to the contrary that an indictment was presented to the court by the foreman of the grand jury, and in their presence. People v. Lee, 2 Utah, 441. Judge EMERSON said in this case: "The court being one of general criminal jurisdiction, all intendments are in favor of the regularity of the proceedings."

Presumption as to return.— Where the record shows that the indictment was presented by the grand jury in open court, it will be inferred that it was done as provided by law, through their foreman. Laurent v. State, 1 Kan. 313. The

court said: "The law requires that the indictment found by a grand jury shall be presented by their foreman, in their presence, to the court. might well be inferred from the record that that body acted through their proper officer, the foreman. But it is unimportant, as it could make no difference to the accused whether it was handed in by the foreman or some other member of the body in their presence. The defect, if it be one, is technical, and cannot be regarded by the court." Per King-MAN, J.

Under a statute authorizing a clerk to record only those indictments which have been found by the grand jury and returned into court there is a legal presumption, from the fact that an indictment has been recorded, that it was found by a grand jury and returned into court. Miller v. State, 40 Ark. 488.

15. State v. Bordeaux, 93 N. C. L60, citing Turner v. State, 9 Ga. 58.

16. State v. Mason, 32 La. Ann. 1018, affirming State v. Ohumacht, 10 La. Ann. 198.

- § 131. Indictment need not appear on record in extenso.—It is not necessary to the validity of an indictment presented by a grand jury that it should appear on the record book in extenso.<sup>17</sup> And this is true though it may be required by law. In such a case an omission to spread an indictment upon the minutes is held to in no way enlarge or diminish the rights of an accused person, as it is said that the policy of the law in requiring a spreading upon the minutes, is to provide against the consequences of the loss, abstraction or destruction of the original.<sup>18</sup>
- § 132. Copying of indorsement not necessary.—The indorsement "A true bill" on an indictment need not be set out on the minutes, where it is regularly indorsed and presented in open court and filed. Where it is properly indorsed and is so filed as to identify it with the minutes this is in fact the recording of the indorsement on the bill.<sup>19</sup>
- § 133. Filing and indorsement of.— Where the statute does not require that an indictment shall be filed in open court, or that the act of marking it shall be done in open court, it is not essential that these acts shall be so done.<sup>20</sup> And generally the omission of the

17. Commonwealth v. Tiernan, 4 Grat. (Va.) 545. See, also, Hopkins v. Commonwealth, 50 Pa. St. 9; Porter v. State, 17 Ind. 415, holding that where the trial is upon the original indictment it is not necessary that the record should show that it had been recorded, compared with the original, and certified by the judge.

18. Glasgow v. State, 9 Bart.

18. Glasgow v. State, 9 Bart. (Tenn.) 485.

State v. Bennett, 45 La. Ann.
 12 So. 306, cited and followed in State v. Clay, 45 La. Ann. 269, 12 So. 307. See, also, State v. Harwood, 1 Wins. (N. C.) 1228; State v. Herron, 86 Tenn. 442, 7 S. W. 37.

Variance between indorsement and copy.—Where the record affirmatively shows that an indictment was returned into court and that the requirements of the statute were complied with beyond all question of doubt, a variance in spelling the foreman's name in copying the indorsements is immaterial where the names are strictly idem sonans. Jackson v. State, 74 Ala. 26.

20. Willey v. State, 46 Ind. 363, so holding under a statute requiring that an indictment must be "returned into open court and filed by the clerk."

Statute directory which requires filing.—In an early case in New York a statute of this character was held to be directory. Dawson v. People, 25 N. Y. 399.

clerk to put the usual file mark on an indictment which has been pleaded to, and of which the record shows due presentation by a grand jury in open court, is not a ground for arrest of judgment.<sup>21</sup> So in a recent case in Illinois, in which this question was raised, the court said: "The indictment having been returned into open court by the grand jury in a body, which fact was shown by the record, it became a part of the records of the court at once, and the omission of the clerk to place his file mark thereon did not affect its legality or destroy its character." <sup>22</sup> So in Alabama it has been decided that when an indictment has been returned into court by the grand jury, properly indorsed by the foreman, a

Court no power to prohibit clerk from filing indictment.—
Where it is provided by statute that when an indictment is found, it must be presented by the foreman to the court in the presence of the grand jury, and must be filed by the clerk, the court has no authority to prohibit the clerk from filing such indictment when so presented. State v. Quarles (Idaho, 1907), 89 Pac. 636, construing Ida. Pen. St. 1887, § 7669.

Where case is transferred.—In Texas it has been decided that where a case is transferred to the county court from the district court the indictment need not be filed in the former court. It was, however, declared that under the provisions of the code it would be better practice to so file it. Short v. State (Tex. Cr. App.), 29 S. W. 1073. See Tex. Code Cr. Proc., Art. 438.

Statutes as to filing informations construed. State v. Brown, 63 Kan. 262, 65 Pac. 213, construing Kan. Gen. St. 1897, ch. 102, \$ 84, and ch. 89, \$ 6; Trimble v. State, 61 Neb. 604, 85 N. W. 844, construing

Neb. Cr. Code, §§ 579, 580.

21. Pittman v. State, 25 Fla. 648, 6 So. 437. See, also, Willingham v. State, 21 Fla. 761; Gallaher v. State, 17 Fla. 370; State v. Plummer, 55 Mo. App. 288; State v. Hogan, 31 Mo. 342.

Sufficiency of indorsement.—
It is not essential to the validity of an indictment that it should appear from the indorsement of filing made by the clerk that it was "presented to the court by the foreman in the presence of the grand jury." State v. Axt, 6 Iowa, 511.

In Mississippi it has been decided that the "marking" the indictment filed, and signing the entries on it, by the clerk, are made by Code the exclusive "legal evidence of the finding and presentment of the indictment." Stanford v. State, 76 Miss. 257, 24 So. 536, decided under Code 1892, § 1346.

22. Kirkham v. People, 170 Ill. 9, 12, 48 N. E. 465. Per Phillips, J.

A paper is filed when it is delivered to the clerk and received by him, to be kept with the papers in the cause. Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494.

further indorsement by the clerk, showing the fact and date of filing is not essential to its validity, but may be made at any time while the case is in fieri, or may be dispensed with in a proper case.<sup>23</sup> And in an early case in Vermont it is decided that the statute requiring the clerk to make a minute of "the true day, month and year," when presented in court, upon all informations and indictments, does not require that the name of the month should appear in the minute, if from the records of the whole term, it admits of no doubt at what time the minute was made.<sup>24</sup> And in a case in Iowa it has been decided that the omission in an indorsement on an indictment of the words "presented in open court" and "in the presence of the grand jury" is not a cause for quashing an indictment.<sup>25</sup> And the failure of clerk to enter upon an indictment the day of its return into court has been held not to entitle the defendant to his discharge.<sup>26</sup>

23. Stanley v. State, 88 Ala. 154, 7 So. 273, so holding under § 4386 of the Code, providing that "All indictments must be presented to the court by the foreman of the grand jury, in the presence of at least eleven other jurors; must be indorsed 'filed,' and the indorsement dated and signed by the clerk." See Spear v. State, 120 Ala. 351, 25 So. 46.

Indictment may be marked filed at subsequent term.—Pence v. Commonwealth, 16 Ky. Law Rep. 148, 26 S. W. 810.

24. State v. Bartlett, 11 Vt. 650. The minute in this case was as follows, "Received and filed this 29th, 1838." The court said: "If the minute is sufficient to answer all the purposes, for which it is required, any verbal departure from the precise requisitions of the statute ought not to be held fatal to the proceedings. In the present case, although the word 'month' is not found in the

minute of the clerk, nor yet the word 'day,' as expressly required by the statute, still if the minute by reference to the records of the term, will admit of no possible misapprehension it is sufficient." Per Redfield, J.

See, also, State v. McGuire, 87 Iowa, 142, 54 N. W. 202, holding, where the indorsement upon an indictment recited that it was presented to the court "at the May term, 189—," and was filed the eighth day of May, 1891, that the presumption was that it was found and presented at the May term, 1891, and that a motion to vacate it because it did not show the year and term at which it was found was properly overruled.

25. State v. Jolly, 7 Iowa, 15.

The indorsement need not name the court to which the indictment is presented. State v. Jolly, 7 Iowa, 15.

26. State v. Clark, 18 Mo. 432.

- § 134. As to jurisdiction of court.—It should appear from the record that the indictment was found by a court of the proper county and it will not be presumed, in the absence of any statement to that effect, that the indictment was so found.<sup>27</sup>
- § 135. As to organization and qualification of grand jury.—
  The record should also show affirmatively the organization of the grand jury,<sup>28</sup> and that the grand jurors were residents of the county.<sup>29</sup> But it has been decided that the impanelling of the grand jury sufficiently appears on the record where it shows that the grand jury returned the indictment into open court, and it is stated in the indictment that the grand jury was duly empanelled, sworn and charged.<sup>30</sup> And it is not essential that an indictment should show that the grand jury was composed of members who possessed the statutory qualifications.<sup>31</sup> And it has
- 27. Clark v. State, 1 Ind. 253, holding that an objection on this ground may be taken advantage of by motion to quash or in arrest of judgment.
- 28. Parmer v. State, 41 Ala. 416, holding that an indorsement on an indictment which purports to be signed by the foreman of the grand jury, is not sufficient proof of that fact. See § 68 herein.

As to sufficiency of showing of record, see Bailey v. State, 39 Ind.

It will be presumed, where an indictment is duly exhibited in open court and indorsed a "true bill," that the list of jurors was legally selected, unless the contrary is shown by the records. But when the records show that the grand jurors were not legally selected and had no authority to act, it is evidence of a higher grade, and shows that the indictment could not have been found, exhibited and indorsed by legal authority.

Dutell v. State, 4 G. Greene (Iowa), 125.

- 29. Territory v. Woolsey, 3 Utah, 470, 24 Pac. 765, wherein the court "The record of this case, which describes the grand jury, and to some extent purports to set out its qualifications, absolutely omits to state that those composing it were 'residents of the county' of Great Salt Lake, which comprised the jurisdiction of the court, and constituted the very body for and over which the grand jurors were charged to inquire. As this qualification, residents 'of the county,' is thus required by the very letter of the Utah statute, as well as by the example of every known judicial system of which the jury is an element, its omission from the description of the grand jury is a fatal error." Per TITUS, J.
  - 30. Powers v. State, 87 Ind. 144.
  - 31. Stone v. State, 30 Ind. 115.
- As to qualifications.—Where the record recites that the grand jur-

been decided that the return of the bill into court by the grand jury properly indorsed by the foreman is evidence that the proper number have concurred in the finding, which cannot be controverted by plea.<sup>32</sup> But in a case in Maine it is decided that if, on motion in writing, in the nature of a plea in abatement, it appear that in finding a bill of indictment there could not have been a concurrence of so many as twelve lawful grand jurors, the accused cannot lawfully be required to plead to the indictment, or be put upon trial, and that such an objection to the indictment is not too late, though not taken till the arraignment of the prisoner.<sup>33</sup>

§ 136. As to swearing of grand jury.—The fact that the grand jury were sworn is held to be a matter which should appear from the record.<sup>34</sup> It has, however, been decided in Alabama that under the statute in that state, the objection can not be raised on error for the first time that the record does not show that the grand jury was sworn.<sup>35</sup> And it will be presumed that the proper oath was administered where the record recites that the jurors were sworn according to law.<sup>36</sup>

ors returning an indictment were "good and lawful men, householders" of the proper county, it will be presumed that they possessed all the statutory qualifications. Willey v. State, 46 Ind. 363.

32. Clark v. State, 24 Ind. 151. See, also, Sparrenberger v. State, 53 Ala. 481, 25 Am. Dec. 643; Nash v. State, 73 Ark. 399, 84 S. W. 497.

Presumption as to number finding indictment.—In a case in Virginia it is decided that, according to the maxim "all things are presumed to be rightly done," in the absence of evidence to the contrary, it will be presumed that an indictment found by a number of grand jurors less than that required at a regular term of court, was found at a term

when a grand jury might lawfully be composed of the lesser number. Price v. Commonwealth, 21 Grat. (Va.) 846, 855.

**33.** State v. Symonds, 36 Me. 128, citing and approving Low's Case, 4 Me. 439.

34. Foster v. State, 31 Miss. 421, holding that the statement in the indictment that they were sworn is not sufficient. See, also, Abram v. State, 25 Miss. 589; Cody v. State, 3 How. (Miss.) 29. This latter case is cited and affirmed in the two preceding cases.

See § 80 herein.

35. Roe v. State, 82 Ala. 68, 3

36. Wells v. State (Ark. 1891), 16

§ 137. As to names of grand jurors.—In an early case it is declared that the names of the grand jurors ought to appear in some part of the record.<sup>37</sup> But where the record shows that the grand jurors were regularly drawn and summoned it is decided that a mistake of the clerk in transcribing one of their names is not a good matter for a plea in abatement to the indictment.<sup>38</sup> And likewise it has been decided that where the record recites the names of the grand jurors as sworn, but omits one name, there is no ground for reversal.<sup>39</sup>

§ 138. As to offense charged.—In the absence of any express requirement of the statute it is not generally held necessary that there shall be an entry on the minutes of the court of the nature or name of the offense charged against a defendant.<sup>40</sup> It may,

S. W. 577; Brown v. State, 10 Ark. 607.

Sworn "according to statute."
—A recital that the grand jurors were sworn "according to the statute" is sufficient. Such a recital is held to admit of no other reasonable inference than that the oath prescribed was administered. Pierce v. State, 12 Tex. 210.

It will be presumed that the jurors were there and there sworn, where it appears from the record that they were sworn. Woodsides v. State, 2 How. (Miss.) 655.

In Oregon it is decided that it will be presumed that an official duty has been regularly performed and that an indictment which complies with a form recommended by the legislative assembly is sufficient, though it omits a recital therein of the oath of the grand jurors. State v. Guglielmo, 46 Oreg. 250, 79 Pac. 577, 80 Pac. 103.

37. Mahan v. State, 10 Ohio, 232. The court said, however, that "it is

probable that on motion a certiorari would be awarded, and the defect cured by the sending up of a new record." Per Woon, J.

**38.** Germolgez v. State, 99 Ala. 216, 13 So. 517.

See State v. Mahan, 12 Tex. 283. 39. Tanner v. State, 92 Ala. 1, 9 So. 613; Floyd v. State, 30 Ala. 511.

40. Tellison v. State, 35 Tex. Cr. R. 388, 33 S. W. 1082; Steele v. State, 19 Tex. App. 425. See Goodwyn v. State, 4 Sm. & M. (Miss.) 520.

An entry misnaming the offense charged is no ground of objection where it is not essential to
the sufficiency of the entry that it
should name the offense charged. In
such a case the entry was declared
to be "an unnecessary act on the
part of the clerk . . and should
not be held to vitiate the indictment."
Rowlett v. State, 23 Tex. App. 191.

Sufficient description of offense in record.—The record of the finding of an indictment for retailing however, by statute be necessary to make some entry upon the minutes in reference to the offense charged. But even in those jurisdictions where it is necessary that there be some such entry upon the record it is not required that the record should show all the constituents of the offense charged, it being declared that it is sufficient if there is a mere general though imperfect description, provided there is no material variance from the indictment. 2

§ 139. Record need not show indictment on testimony duly sworn.—It need not appear on the record, in the absence of a statute to the contrary, that the indictment was found upon testimony duly sworn.<sup>43</sup>

## § 140. Of indictment against two or more persons.—

ardent spirits without license was held to be sufficient where it states that the grand jury presented an indictment against William Tefft for retailing liquors, a true bill. v. Commonwealth, 8 Leigh (Va.), 721. And in a case in Virginia it was decided that the following entry on the record of the finding of an indictment for a misdemeanor was suffi-"Returned into court, and among other things, presented an indictment against Thomas Nutter for felonious assault and battery." "A true bill." Commonwealth v. Nutter, 8 Gratt. (Va.) 698.

41. Denton v. State, 3 Tex. App. 635, decided under Article 389 of the Code of Criminal Procedure previous to its amendment in 1876, which required that "The fact of the presentment of the indictment in open court by the grand jury shall be entered apon the minutes of the proceedings of the court, noting briefly the style of the criminal action and the of-

fense charged." It was held in this case that an entry noting the offense as "A to kill" was not a sufficient compliance with the requirement.

**42**. State v. Geyer, 44 W. Va. 649, 29 S. E. 1020, citing State v. Gilmore, 9 W. Va. 641; State v. Fitzpatrick, 8 W. Va. 707.

43. United States v. Murphy, McArthur & M. (D. C.) 375, 48 Am. Rep. 75. Justice CASTLES said in delivering the opinion in this case: "The law presumes that when the grand jury find their indictment, they find it upon the sanction of the necessary facts, and under the restrictions and within the purview of the oath they have taken, and when they have done that, they have done all that the law requires of them."

See, also, King v. State, 6 How. (Miss.) 730; Gilman v. State, 1 Humph. (Tenn.) 59.

See §§ 123-126 herein as to whether finding of grand jury can be varied by extrinsic evidence. Where an indictment is found against two or more persons and the clerk, in making an entry of it, omits one or more names of the accused, an objection that such name or names were omitted is not available in behalf of the person or persons whose names were correctly noted, it being declared that such an entry is sufficient to show that an indictment was found against one whose name was correctly copied.<sup>44</sup> But where an indictment was against two persons, and the clerk, in making a minute of it, accidentally omitted the name of one of the accused persons, it was held that the record could not be amended at a subsequent term of the court by inserting the name which was omitted, and that the indictment against such person must be quashed.<sup>45</sup>

§ 141. Filing away of indictment—Reinstatement of.— In Kentucky the practice has long been recognized of filing away an indictment and the subsequent reinstatement thereof by motion. 46 So in a case in this state it has been decided that, although

44. Drake & Cochren's Case, 6 Gratt. (Va.) 665; Blevins v. State, Meigs (Tenn.), 82, holding that if an indictment be preferred against two for a certain offense, and the record shows that the grand jury came into open court, in a body, and returned a bill of indictment against one of them, for the same offense, upon which he is afterwards arraigned, tried and convicted, the judgment will not be arrested on account of this ambiguity in the record, for the fact that the indictment was preferred against two does not make it the less of an indictment against one of the two.

See, also, State v. Compton, 13 W. Va. 852.

45. Drake & Cochren's Case, 6 Gratt. (Va.) 665.

Compare State v. Banks, 40 La. Ann. 736, 5 So. 18, holding it sufficient where the whole record showed that the indictment which was presented was entitled "State of Louisiana v. Adolphus Banks et als.", though in the minutes of the day the clerk erroneously copied the title as against Banks only. See State v. Bell, 159 Mo. 479, 60 S. W. 1102.

46. Jones v. Commonwealth, 114 Ky. 599, 71 S. W. 643. It was said in this connection by the court: "The practice of filing away indictments, though never authorized by legislative enactment, has long obtained in this State. It either came to us as a part of the common law, or was devised by some one or more of the pioneer jurists of our Commonwealth, to whose wisdom we are indebted for much that is good in our present system of jurisprudence. At any rate, the long continuance of the practice, and its convenience as well, admonish us that it would be unwise an indictment had been filed away by order of court for more than eight years, without a provision in the order itself for its reinstatement, its validity is not thereby affected as against a defendant who was not before the court, and such an indictment may be reinstated on the arrest of the defendant and a trial may be had thereon.<sup>47</sup> It has, however, been determined that such practice should not be allowed under the constitutional provision that in prosecution by indictment or information the accused shall have a speedy trial, where the accused is present in court, objects to the order and demands a speedy trial.<sup>48</sup>

§ 142. Omissions supplied by reference to other parts of record.—It may be stated as a general rule that where there is any uncertainty or omission in one part of a record, it will not be fatal, provided the uncertainty can be explained or the omission supplied by resort to any other part of the record.<sup>49</sup> So it has been decided that even if it be error not to state the character of the offense charged in the first entry of the minutes, such error is not fatal where the omission is supplied by other parts of the record.<sup>50</sup> And where an indictment charged the commission of an offense on the 18th of August, and it appeared that the indictment was filed on that day, from the clerk's indorsement thereon, it was decided that the record entry of presentments by the grand jury, showing that it was filed on a date subsequent to

to abrogate it altogether." Per SETTLE, J.

See, also, Ashlock v. Commonwealth, 7 B. Mon. (Ky.) 44.

**47**. Gross v. Commonwealth, 26 Ky. Law Rep. 870, 82 S. W. 618.

48. Jones v. Commonwealth, 114 Ky. 599, 71 S. W. 643. Citing Commonwealth v. Bottoms, 105 Ky. 222, 48 S. W. 974, wherein the court said where a similar question was raised: "Where the defendant is before the court, and the case stands for trial, we are not aware of any rule of practice that would authorize the attor-

ney for the Commonwealth on his own motion to file the indictment away on conditions, and hold the prosecution in terrorem over the defendant, and we do not approve of such practice." Per White, J.

49. Commonwealth v. Stone, 3 Gray (Mass.) 453; Goodwyn v. State, 4 Sm. & M. (Miss.) 520.

50. Goodwyn v. State, 4 Sm. & M. (Miss.) 520, Judge Thacher said: "It is a rule well settled, that if there be an uncertainty in any part of the record, it may be explained by any other part of the record."

that on which the commission of the offense was charged was admissible for the purpose of showing the true date of the presentment of the indictment by the grand jury.<sup>51</sup>

§ 143. Amendment of record—Nunc pro tunc entries.—Nunc pro tunc entries may be directed by the court to be made on the record in furtherance of justice,<sup>52</sup> as in the case of a clerical error or misprision of the clerk.<sup>53</sup> And it may be stated as a general rule that the record may be amended by a nunc pro tunc entry to show the return of an indictment into court;<sup>54</sup> for where the record fails to show this fact, it is declared that it is not only competent for the court, but that it is its duty, whenever the fact is brought to its attention that the clerk has omitted to make the proper entry in regard thereto, to cause the same to be done by an entry nunc pro tunc, so that the record will conform to the facts as they actually occurred and existed.<sup>55</sup> And likewise such an entry is permissible in respect to the filing of an indictment<sup>56</sup> as to the placing of the file mark thereon<sup>57</sup> or to amend the clerk's signature to the file mark,<sup>58</sup> or to show the date of filing.<sup>59</sup> So

51. Kennedy v. State, 11 Tex. App. 73.

52. State v. Clark, 18 Mo. 432.

**53**. Gore v. People, 162 Ill. 259, 44 N. E. 500.

54. Arkansas.—Green v. State, 19 Ark. 178; holding, however, that accused must be in court when amendment made.

Illinois.—Gore v. People, 162 Ill. 259, 44 N. E. 500, holding that court has such power where there is sufficient memoranda or record by which to amend.

Indiana.—Waterman v. State, 116 Ind. 51, 18 N. E. 63; Long v. State, 56 Ind. 133; Bodkin v. State, 20 Ind. 281.

North Carolina.—State v. Bordeaux, 93 N. C. 560.

Tennessee.—State v. Willis, 3 Head (Tenn.) 157.

**Texas.**—Moore v. State, 46 Tex. Cr. 520, 81 S. W. 48; Tyson v. State, 14 Tex. App. 388.

Vermont.—State v. Butler, 17 Vt. 145.

But see Felker v. State, 54 Ark. 489, 16 S. W. 663.

**55.** Waterman v. State, 116 Ind. 51.

56. West v. State, 71 Ark. 144, 71 S. W. 483; Pence v. Commonwealth, 95 Ky. 618, 26 S. W. 810, holding it may be supplied at a subsequent term.

57. Kirkham v. People, 170 Ill. 9,48 N. E. 465; Rippey v. State, 29Tex. App. 37, 14 S. W. 448.

58. The clerk's signature to the file mark on an indictment may be amended. Scrivener v. State, 44 Tex. Cr. Rep. 232, 70 S. W. 214.

59. State v. Bell, 159 Mo. 479, 60

it is declared in a recent case in Alabama that the mere omission of the clerk to mark an indictment filed when returned into court by the grand jury may afterwards be corrected by so indorsing it under the direction of the court. This is regarded as a mere clerical omission, the correction of which could not possibly affect the validity of an indictment otherwise regular and legal. And an error in the record as to the impanelling of the grand jury, which is a merely clerical one, is held not to be fatal but correctible by the court. But where a bill was indorsed "a true bill," against a person of a different name than the one against whom the indictment was found and the name noted upon the record corresponded to the indorsement, it was decided that the record could not be amended to conform to the indictment.

- § 144. Same subject continued.—As to the course of amending the record as to an indictment, it is said in a case in Texas that the proper course would be by an order at the time when the amendment is made, and not by erasing or altering an order entered upon the minutes at a previous term of the court. 63 And where an order amending the record in reference to an indictment was actually made at a former term of court, and the clerk failed to enter the same, the court may at any time direct such an order to be entered on the records as of the term when it was made. 64
- S. W. 1102, wherein it is declared that the record should show that the indictment was filed the date of its return into court and that the court has power to make an entry nunc protunc to show this.
- **60**. Hicks v. State, 123 Ala. 15, 26 So. 337. Per Tyson, J.
- 61. State v. Gilmore, 9 W. Va. 641, holding that a recital in the record that the jurors "were sworn a grand jury of inquest upon the body of Mineral County" could be corrected to read "for" instead of "upon."
  - 62. Commonwealth v. McKinney,

- 8 Grat. (Va.) 589, so holding in the case of an indictment for wilful trespass against Joseph McKinney which was indorsed by the grand jury against Thomas McKinney "a true bill," and it was so noted upon the record.
  - 63. Rhodes v. State, 29 Tex. 188.

Where no order is made.—An entry made at a subsequent term where no order has been made authorizing it will not cure an omission to make such entry at the proper time. Bowen v. State, 81 Ga. 482, 8 S. E. 736.

64. Rhodes v. State, 29 Tex. 188.

But an entry at a subsequent term of the fact that the indictment was returned into court will not cure the omission to enter the order at the proper time, where there has been no order to make the entry nunc pro tunc. 65 And it has been held that the court has no power at a subsequent term to order an amendment of the original entry in this respect. 66

§ 145. Power of court to supply record—Lost indictment.— It is said that a court of record of general jurisdiction has inherent power, independent of any statute, to re-establish its lost or destroyed records or proceedings. And it is generally recognized that in the exercise of this power a court may, in the absence of any statutory or code provision which is controlling, proceed as in civil cases, and may direct that a lost or destroyed indictment be supplied by a copy established as such by satisfactory proof. It is, however, determined that a court should be careful

**65**. Bowen v. State, 81 Ga. 482, 8 S. E. 736.

66. Cornwell v. State, 53 Miss. 385.

67. State v. Simpson, 67 Mo. 647, holding that the court has, independent of any statute, to supply a lost, mutilated or destroyed record. See, also, cases cited in following note.

68. Florida.—Roberson v. State, 45 Fla. 94, 34 So. 294, quoting from 1 Bishop New Crim. Proc., § 1400, as follows: "The better opinion is that when the indictment is lost, the prosecution may proceed to trial, on a substituted copy, if exact, and the proof of it conclusive." See, also:

Iowa.—State v. Shank, 79 Iowa, 47, 44 N. W. 241.

Mississippi.—Helm v. State, 67 Miss. 562, 7 So. 487, wherein the court said, per Judge Woods: "We cannot bring ourselves to sanction for a moment the idea that whenever an indictment is lost, or mislaid, or

stolen, during the progress of a trial for a capital felony, there can be no substitution of the missing paper, but that in every such case there must follow the discharge of the prisoner. We hold to the reasonable rule that a criminal pleading, like any other, may be supplied by substitution, in some proper way,—in the manner prescribed by law."

Missouri.—State v. McCarver, 194 Mo. 717, 92 S. W. 684; State v. Simpson, 67 Mo. 647.

**Pennsylvania.**—Commonwealth v. Becker, 14 Pa. Super. Ct. 430, holding that such power exists in a court which has jurisdiction of the cause.

**South Dakota.**—State v. Circuit (S. D.), 104 N. W. 1048.

Tennessee.—State v. Gardner, 13 Lea (Tenn.), 134, wherein it was declared by Judge FREEMAN that "The plain principle of the common law and of sound reason should apply in a criminal case as well as in civil in exercising this authority, and that it only has power to supply a lost indictment when there is evidence to show that it was a

cases, that is, when the papers are lost, they shall be carefully and accurately supplied, by satisfactory evidence of their loss and their contents."

But see Ganaway v. State, 22 Ala. 772, wherein the question whether the court has power to allow the substitution by the satisfactory proof of a copy of an indictment which has been lost is considered. It was there argued that the right of the court to supply or substitute any part of the record which has been lost or destroyed, in a civil case, existed also in the case of a lost indictment. But the court, after considering the question, reached the conclusion, from which two judges dissented, that the court had no such power. It was declared by one of the judges in this case that "The court has no power to make an indictment, or to direct one to be made. That power resides exclusively with the grand jury. mitting, then, that a court may supply or substitute whatever part of the proceedings it has power to issue or create in the first instance, yet the principle will not embrace an indictment because the court has no power to make that or direct it to be Per PHELAN, J. Compare Commonwealth v. Keger, Duv. (Kv.) 240.

Evidence insufficient to show proposed substitute a substantial copy.—State v. Thomas, 97 Iowa, 396, 64 N. W. 743, so holding under following facts: On a motion to substitute an alleged copy of a lost

indictment, the attorney who made the motion, testified that he never saw the original, nor a copy of it, nor consulted with the attorney who drew it, as to its contents; and that he drew the proposed substitute after examining, and having returned to their custodian, the minutes of the evidence before the grand jury. attorney who drew the original testified that the substitute contained substantially all the allegations in the original, but that he could not say it was a true copy; that it was more voluminous than the original, and contained allegations not in the latter; that there were descriptions, as to instruments used by defendants in committing  $\mathbf{the}$ offense, which were not in the original, and that the latter did not contain the words "and of their malice aforethought" found in the substitute proposed.

The accidental mutilation of an indictment by tearing it does not necessarily destroy its identity. Commonwealth v. Roland, 97 Mass. 598, holding that an indictment torn into three pieces, which may be so united without the omission of any material word as to restore it substantially to the form in which it was presented in court by the grand jury, is sufficient a a basis for further legal proceed-The court said: "The accidental mutilation of the indictment by cutting it into several pieces does not destroy its identity or prevent its being restored to a condition in which it can be rendered intelligible and

record of the court.<sup>69</sup> And where the original has been lost it has been declared that it would be proper to show by affidavit that the original bill has been lost or destroyed, but that the omission to file such affidavit would be merely a technical error or defect which should be disregarded.<sup>70</sup>

§ 146. Same subject—Statutory provisions affecting.— The question as to the course to be pursued in the case of a lost indictment may, however, be provided for by statute.<sup>71</sup> So, under the statutes in force in several states, in case of the loss or destruction of the original indictment, the person indicted may be tried and convicted on a copy from the record where there is no plea denying that the original has been found and returned by the grand jury into court.<sup>72</sup> And in Texas it was decided that under

substantially complete in all essential particulars. When the parts are united, as can readily be done without danger of mistake, by joining several words which have been severed, there will be no material omission of any averment, or even word, contained in the indictment as presented in court by the grand jury. This is manifest from inspection. It can not, therefore, be properly said that the indictment is destroyed or in such condition as to be rendered unfit to be the basis of further proceedings."

69. State v. Simpson, 67 Miss. 647.
70. Millar v. State, 2 Kan. 174, decided under § 276 of the Criminal Code, providing that technical errors

or defects are to be disregarded.

71. State v. Elliott, 14 Tex. 423, decided under Hart Dig., Art. 464, providing that in such a case the fact of the loss is to be entered upon the minutes of the court, which avoid the Statute of Limitations, and a new indictment is to be preferred.

72. Arkansas.—Miller v. State, 40 Ark. 488, one judge dissenting. Decided under Acts of 1881, § 2, p. 106.

**Louisiana.**—State v. Heard, 49 La. Ann. 375, 21 So. 632, decided under Act 17 of 1878.

**Mississippi.**—McGuire v. State, 76 Miss. 504, 25 So. 495, decided under Code 1892, § 1347.

**Tennessee.**—Epperson v. State, 5 Lea (Tenn.) 291, decided under Code, § 5139.

**Texas.**—Withers v. State, 21 Tex. App. 210, 17 S. W. 725, construing Art. 434 of the Code of Criminal Procedure.

A statute is valid and constitutional which so provides. McGuire v. State, 76 Miss. 504, 25 So. 495. So in Texas it was decided that such a statute was not in conflict with the Fourteenth Amendment of the Constitution of the United States or of § 10, Article 1, of Bill of Rights of the State Constitution. Withers v. State, 21 Tex. App. 210, 17 S. W. 725.

the statute there in force, the district attorney had the right to substitute an indictment for one which, though not lost or mislaid, had become so mutilated as to be unintelligible. Again, a statute providing for the re-establishment of lost or destroyed papers, records, files and proceedings, has also been held to apply as well to the re-establishment of the papers, records, files and proceedings in a criminal case as to a civil case, and to permit the re-establishment of a lost or destroyed indictment, provided the copy produced for re-establishment be conclusively shown to be an exact and accurate copy of the lost original.

§ 147. Same subject—After arraignment or trial.—Where a defendant has been arraigned upon an indictment, and it is subsequently lost or abstracted, the courts generally recognize the existence of the power to substitute a copy and to proceed upon the record thus made the same as upon the original indictment.<sup>75</sup> So in a case in Alabama, the earlier case of Gannaway v. State,<sup>76</sup> is

73. State v. Ivy, 33 Tex. 646. See Bowers v. State, 45 Tex. Cr. 185, 75 S. W. 299, holding that though there may be a substitution of an information or complaint, such substitution is a judicial act, and is upon notice, and that it is competent for the defendant to contest the substitution of such papers if he sees fit, but that the only contest that can be made is that the substituted paper is not a substantial copy of the original.

**74.** Roberson v. State, 45 Fla. 94, 34 So. 294.

75. State v. Rivers, 58 Iowa, 102. 12 N. W. 117, wherein it is said "This rule is in consonance with modern practice, which disregards unimportant technicalities, not vital or material to the rights of the parties." Per ROTHROCK, J.

See Schultz v. State, 15 Tex. App. 258, 49 Am. Rep. 194, so holding under Art. 434 of the Code of Criminal Procedure. State v. Rivers, 58 Iowa, 102, 12 N. W. 117, in which the court in deciding that a court has power to substitute a copy of an indictment lost after the arraignment of the accused says: "There is an inherent power in the court to preserve and protect its jurisdiction when it has once attached, and to that end we can see no good reason why it may not substitute any of its records which may be lost, by properly authenticated copies." Per ROTH-BOCK, J.

Where the defendant is arraigned upon the original indictment, which is subsequently lost, it is not necessary to the legality of his trial upon a certified copy of such indictment that there be a new arraignment. McGuire v. State, 76 Miss. 504, 25 So. 495.

76. 22 Ala. 772; see preceding section.

distinguished and it is decided that where an indictment is lost after arraignment and pending the trial of the accused, the court has the inherent power to order the substitution of the indictment, without the consent of the accused or of his counsel.<sup>77</sup> And in Ohio it has been decided that if, after conviction, the indictment be stolen from the files, its place may be supplied by a copy, like lost instruments or pleadings, and that the presence of the original indictment is not indispensible to the sentence of the prisoner.78 And a similar conclusion has also been reached in a recent case in West Virginia. 79 But where it was shown that the original indictment was on file in the clerk's office, where it had been sent for inspection of the court on a former appeal, which fact was within the knowledge of the parties by whom it could have been obtained by taking proper steps, it was decided that the original could not be considered as lost, mislaid, mutilated or obliterated, so as to authorize a substitution thereof.80

§ 148. Where indictment found after substitution.—Where a court has substituted an indictment for one which has been misplaced and the original is subsequently found, the court may properly permit the trial to proceed on the original.<sup>81</sup> In a case in Georgia it is decided that where a paper has been, by a proper order of court, established as a copy of a lost indictment or presentment, the copy, until such order has been set aside, stands in lieu of the original, and that if such order is not revoked, the mere finding of a paper purporting to be the lost original cannot in any manner affect the legal status of the case.<sup>82</sup>

<sup>77.</sup> Bradford v. State, 54 Ala. 230.78. Mount v. State, 14 Ohio, 295,45 Am. Rep. 542.

<sup>79.</sup> State v. Strayer, 58 W. Va. 676, 52 S. E. 862,

<sup>80.</sup> Shehane v. State, 13 Tex. App.

<sup>81.</sup> Owens v. State, 46 Tex. Cr. 14, 79 S. W. 515.

<sup>82.</sup> Branson v. State, 99 Ga. 194,23 S. E. 404.

## CHAPTER VII.

## CAPTION AND COMMENCEMENT.

- Section 149. Caption; not a part of indictment.
  - 150. Sufficiency of caption generally.
  - 151. Effect of errors or defects.
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  - 153. Caption should be distinguished from commencement; confusion between.
  - 154. Necessity for caption generally.
  - 155. What caption should state generally.
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  - 157. Same subject; application of rule.
  - 158. As to time of finding indictment generally.
  - 159. Same subject; effect of clerk's certificate.
  - 160. Should show jurisdiction of court; generally.
  - 161. Same subject; no statement in caption; sufficient if record shows jurisdiction.
  - 162. Same subject; amendment of caption.
  - 163. Names of judges.
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  - 165. Same subject; as to terms of court.
  - 166. Same subject; reference to first day in stating term of court.
  - 167. Name of offense.
  - 168. Name of defendant.
  - 169. Grand jury; showing as to county.
  - 170. Grand jury; as to qualifications generally; "good and lawful men."
  - 171. Same subject; that grand jury summoned and returned.
  - 172. Same subject; that grand jurors were sworn.
  - 173. Same subject; as to number of grand jurors.
  - 174. Same subject; as to names of grand jurors.
  - 175. Reference to caption to cure defects in indictment.
  - 176. Amendment of caption.
  - 177. Commencement of indictment; generally.
  - 178. Effect of clerical or grammatical errors.
  - 179. Grand jury; commencement should show county.
  - 180. Grand jury; matters unnecessary to state.
  - 181. Showing as to presentment; use of words "on their oath."
  - 182. Necessity of averment as to grand jury in each count.

- 183. Showing that prosecution is in the name and by the authority of the State.
- 184. Same subject; effect of constitutional or statutory provisions.
- 185. As to the offense.
- 186. Defects cured by reference to caption or other parts of indictment.
- § 149. Caption—Not a part of indictment.—The caption of an indictment is regarded as no part of the indictment.¹ It is merely
- 1. United States.—United States v. Clark, 46 Fed. 633; United States v. Thompson, Fed. Cas. No. 16,490, 6 McLean, 56.

Dakota.—United States v. Beebe,Dak. 292, 11 N. W. 505.

Illinois.—George v. People, 167 Ill. 447, 47 N. E. 741.

Louisiana.—State v. Folke, 2 La. Ann. 744; State v. Kennedy, 8 Rob. 590.

Maine.—State v. Canley, 39 Me. 78.

Missouri.—State v. Daniels, 66 Mo. 192; Kirk v. State, 6 Mo. 469.

New Hampshire.—State v. Gary, 36 N. H. 359.

New Jersey.—State v. Society for Establishing Useful Manufactures, 42 N. J. L. 504; State v. Jones, 9 N. J. L. 357, 17 Am. Dec. 483.

New York.—People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551; People v. Myers, 2 Hun, 6.

North Carolina.—State v. Brickell, 8 N. C. 354.

**Rhode Island.**—State v. Mowry, 21 R. I. 376, 43 Atl. 871.

Tennessee.—Mitchell v. State, 8 Yerg. 514; McClure v. State, 1 Yerg. 206

Texas.—English v. State, 4 Tex. 125.

Vermont.—State v. Gilbert, 13 Vt. 647.

Virginia.—Robinson v. Commonwealth, 88 Va. 900, 902, 14 S. E. 627.

**Wisconsin.**—State v. Emmett, 23 Wis. 632; State v. McCarty, 2 Chand. 199, 2 Pin. 513, 54 Am. Dec. 150.

Mr. Chitty said in this connection: "When the indictment is returned from an inferior court, in obedience to a writ of certiorari, the statement of the previous proceedings sent with it is termed the 'Schedule,' and from this instrument the caption is taken. When thus taken from the schedule, it is entered upon the record, and prefixed to the indictment, of which, however, it forms no part, but is only the preamble, which makes the whole more full and explicit. In cases of removal by certiorari, its principal object is to show that the inferior court had jurisdiction, and, therefore, a certainty in that respect is particularly requisite." 1 Chit. Cr. Law, 327, quoted in Robinson v. Commonwealth, 88 Va. 900, 902, 14 S. E. 627.

In Louisiana it has been decided that the caption is uniformly dispensed with in that State. State v. Marion, 15 La. Ann. 495.

Copy of indictment required

the record of the court and might be wholly omitted.<sup>2</sup> It need not be again repeated in any part of the indictment,<sup>3</sup> and a quashal of the first count, where there is more than one count, will not affect the others.<sup>4</sup> So it has been decided that an unnecessary written caption constitutes no part of an indictment, nor do mottoes or business cards, though unnecessary and unseemly, impair its validity if otherwise valid.<sup>5</sup>

§ 150. Sufficiency of caption generally.—The sufficiency of a caption is not to be determined by strict adherence to technicalities.<sup>6</sup> Where time and place are set forth in the caption of an indictment, with sufficient certainty to a common intent, it is said that legal subtleties and niceties are to be disregarded.<sup>7</sup> As to the sufficiency of the caption generally, it is said by an early English authority that it may be sufficient though certain statements be omitted, such as "good and lawful men" or "then and there" if the indictment were in a superior court, and that which is omitted be, in common understanding, implied in what is expressed.<sup>8</sup> And it is said in an early case in Tennessee that

to be served on the prisoner need not include the caption. Gater v. State, 141 Ala. 10, 37 So. 692.

An abbreviation of the name of the State is not a fatal defect. Thus it was so held where it was headed "State of Mo." instead of "State of Missouri." State v. Foster, 61 Mo. 549.

There may be a rejection as surplusage of matter in the body of the indictment which properly belongs in the caption. Rose v. State, Minor (Ala.), 28.

- State v. Nixon, 18 Vt. 70; State
   Gilbert, 13 Vt. 647.
  - 3. Reeves v. State, 20 Ala. 33.
- West v. State, 27 Tex. App. 472,
   S. W. 482.
- 5. Owens v. State, 25 Tex. App. 552, 8 S. W. 658, so holding where

preceding the indictment, which was properly commenced, there was written or printed the following: "The Indictment; Empire Print; Encourage home industry and your money will be circulated among the people."

6. State v. Brisbane, 2 Bay. (S. C.) 451; Tipton v. State, Peck. (Tenn.) 308.

That dates in a caption are in Arabic numbers is not a ground of objection. State v. Smith, Peck (Tenn.), 165.

Sufficient captions.—See Commonwealth v. James, 1 Pick. (Mass.) 375; State v. England, 19 Mo. 386; Benedict v. State, 12 Wis. 313.

- 7. State v. Brisbane, 2 Bay. (S. C.) 451.
  - 8. 3 Bac. Abridg. 573, 574.

"This authority lays down the principle, that ought to govern at this day, the construction a court is to give the caption of an indictment, to which the present objections and others of a like nature are taken; a principle formed in good sense, restraining and contravening the pernicious effect of too strict an adherence to technical forms when it would operate against the reason that originally prescribed those forms, and be subversive of those ends, the use of them was intended to secure." 9

- § 151. Effect of errors or defects.—Though there may be errors or defects in the caption, an indictment will not be thereby vitiated. To so the validity of an indictment is not affected by a misstatement of a date in the caption, or of the place where the offense was committed, where the place of commission is shown by the body of the indictment, or by a misnomer of the offense, the offense being correctly named in the indictment.
- § 152. Caption applies to each count.—The caption of an indictment is a statement which is applicable to each count in the indictment,<sup>14</sup> and the caption is not to be stricken out on a demurrer
- 9. Tipton v. State, Peck (Tenn), 308, 312. Per White, J.
- 10. Indiana.—Malone v. State, 14 Ind. 419.

Iowa.—Hampton v. United States, Morris, 489.

North Carolina.—State v. Sprinkle, 65 N. C. 463.

**Pennsylvania.**—Commonwealth v. Shaffner, 2 Pearson, 450.

Texas.—English v. State; 4 Tex.

Wisconsin.—State v. Gaffrey, 4 Chand. 163.

See, also, subsequent sections in this chapter.

A variance between the caption and the record is not a ground for quashing an indictment or for an arrest of judgment. Mitchell v. State, 8 Yerg. (Tenn.) 514.

11. United States v. Borneman, 35 Fed. 824; State v. Robinson, 85 Me. 147, 26 Atl. 1092; Commonwealth v. Brown, 116 Mass. 339.

12. In re McDonald, 19 Mo. App. 370.

13. Howard v. State, 67 Ind. 401.

14. Paira v. State, 49 Ala. 25; Donahue v. State, 165 Ind. 148, 74 N. E. 996; Greenwood v. Commonwealth, 11 Ky. Law Rep. 220, 11 S. W. 811; West v. State, 27 Tex. App. 472, 11 S. W. 482; Dancey v. State, 35 Tex. Cr. 615, 34 S. W. 113, 938.

The caption need not be again repeated in any part of the indictment. Overton v. State, 60 Ala. 73,

which is sustained to the first count.<sup>15</sup> So, where it appears from the caption of an indictment that the prosecution is "in the name and by the authority" of the state, this need not be again averred in subsequent counts, and where there is more than one count to an indictment and a *nolle prosequi* is entered as to the first, the subsequent counts will not be defective because such averment does not appear therein.<sup>16</sup>

§ 153. Caption should be distinguished from commencement—Confusion between.—In the American courts there is, in many cases, a failure to recognize the distinction between the caption and commencement of an indictment, and that the caption is no part of the indictment, and owing to these facts it is frequently extremely difficult to deduce rules as to whether the caption should or should not contain certain averments or statements.<sup>17</sup> So in

citing Perkins v. State, 50 Ala. 154; Reeves v. State, 20 Ala. 33; Morgan v. State, 19 Ala. 558; State v. Murphy, 9 Port. (Ala.) 487. See, also, Anderson v. State, 39 Tex. Cr. 34, 44 S. W. 824.

15. Pairo v. State, 49 Ala. 25; Greenwood v. Commonwealth, 11 Ky. Law Rep. 220, 11 S. W. 811.

16. Davis v. State, 19 Ohio St. 270.

17. United States v. Beebe, 2 Dak. 292, 301, 11 N. W. 505, in which the court says: "Some of the courts in this country do not recognize the distinction between 'caption' and 'commencement,' both being by them called 'caption.' It is no part of the indictment itself, and was originally only a copy of the style of the court at which the indictment was found. By the strictest rule of the common law, the caption was deemed sufficient if it described, with reasonable certainty, the court before which the indictment was found, the time and

place where it was found, and the jurors by whom it was found. Both the caption and the commencement are purely formal, and they may be amended, if faulty, by the record in the proper manner." Per SHAN-NON, J. State v. Kennedy, 8 Rob. (La.) 590, wherein it is said: "Now the caption is not to be compounded with the commencement, nor with any other part of an indictment. It forms no part of that instrument, but is a wholly separate and independent act, which is not submitted to, nor acted upon, by the grand jury, prefers no charge against the accused, and never figures upon the record until after the bill has been found, and, in general, not until the indictment is removed for trial to a higher tribunal, by a writ of error or of certiorari." Per King, J. People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551, citing Bishop on Crim. Prac., § 154, as saying, "The whole question as to what a caption should contain a case in New York it is said, "A great deal of confusion, however, exists in the books, because the distinction between the commencement and the caption of an indictment, which has always existed in England, has not uniformly been maintained here. The caption is no part of the indictment. wholly of the history of the proceedings when an indictment is removed from an inferior to a superior court," 18 And it is said in a case in South Carolina: "There has been some contrariety of opinion as to where the caption ends and the indictment begins, and especially whether the words, 'The jurors, etc., on their oaths, present,' constitute a part of the caption or a part of the indict-In England and in many of the states following the English practice, these words are termed the commencement of the indictment, and not considered to be a part of the caption. in our state it has been distinctly held that they are part of the caption; that it is mere introductory matter and constitutes no portion of the indictment." 19

§ 154. Necessity for caption generally.—The caption, as has been stated, forms no part of the indictment, and the necessity for that instrument cannot arise while the prosecution is pending in the court in which the bill is preferred.<sup>20</sup> And in New York it has been decided that a caption is not necessary where an indictment is removed from a superior to an inferior court.<sup>21</sup> But a caption is held to be necessary where an indictment is removed into a superior court.<sup>22</sup> In Louisiana it is decided that as a prose-

appears when approached through American books, draped in mist and girded about with darkness."

18. People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551. Per FULLER-TON, J.

State v. Moore, 24 S. C. 150,
 Am. Rep. 241. Per SIMPSON. J.

20. State v. Folke, 2 La. Ann. 744. Per King, J. Wagner v. People, 4 Abb. Dec. (N. Y.) 509.

The caption does not appear until the indictment is transmitted from the court in which it is found to a higher court. Robinson v. Commonwealth, 88 Va. 900, 14 S. E. 627.

21. Loomis v. People, 19 Hun (N. Y.), 601.

22. Tipton v. State, Peck. (Tenn.) 308, wherein it is said: "It is necessary that a caption should accompany every indictment removed into a superior court, by certiorari or writ of error, in order to show that the court which took the indictment had legal authorty and power to take

cution is never in that state removed from one to a higher tribunal a caption can be of no benefit to an indictment, and is uniformly dispensed with.<sup>23</sup>

§ 155. What caption should state generally.—The caption of an indictment is said to be that entry upon the records of the court showing when and where the court was held, who presided as judge, the venire, and who were summoned and served as grand jurors.<sup>24</sup> So in an early case in Mississippi it was held that it is the business of the caption of an indictment to state with sufficient certainty not only the style of the court, the judge then presiding, but the time and place when and where it was found, and the jurors by whom it was found.<sup>25</sup> And in a case in New Hampshire the court declared that "The caption is no part of the indictment; its office is to state the style of the court, the time and place when and where the indictment was found, and, in England and some of the states, the jurors by whom it was found; and these particulars it must set forth with reasonable certainty." <sup>26</sup>

§ 156. Caption should state place at which found.— It may be stated generally that the caption should name the place at which the indictment was found,<sup>27</sup> and that this should appear with reasonable certainty.<sup>28</sup> Where, however, the indict-

it, for the offense specified in the indictment, for unless so taken there ought not to be any judgment upon it, and not only should the caption exhibit a court, having power to take the indictment, but, also, that exercising this power, it had conformed to legal requisitions." Per Haywood, J.

23. State v. Marion, 15 La. Ann. 495; State v. Lyons, 3 La. Ann. 154; State v. Kennedy, 8 Rob. (La.) 590.

24. Gater v. State, 141 Ala. 10, 37 So. 692, citing and quoting from Overton v. State, 60 Ala. 73, which cites to same point Reeves v. State, 20 Ala. 33.

"The caption is a mere history or record of the case, up to the finding of the indictment, containing the name of the court, county, and State, and where and by whom the indictment has been found." State v. Moore, 24 S. C. 150, 58 Am. Rep. 241. Per SIMPSON, J.

25. Thomas v. State, 5 How. (Miss.) 20.

26. State v. Gary, 36 N. H. 359. Per Fowler, J.

27. Thomas v. State, 5 How. (Miss.) 20.

28. State v. Gary, 36 N. H. 359; Tenorio v. Territory, 1 N. M. 279; State v. Williams, 2 McC. (S. C.) 301. ment itself or the record shows such fact, the validity of the indictment will not be affected by the failure to state it in the caption.<sup>29</sup> And the caption, even if defective in not stating the place where found, may be amended at any time to show this.<sup>30</sup> But where the caption and the record of the organization of the court both fail to show where the court was held, an indictment in such a case is held to be bad and may be quashed upon motion or taken advantage of by a motion in arrest of judgment.<sup>31</sup>

§ 157. Same subject—Application of rule.—Though the name of the state does not appear, it has been held sufficient where the body of the indictment shows such fact. And where the caption stated the name of the court in which the indictment was found and the name of the county was stated in the body of the indictment, it was held that the indictment was not defective. And under such circumstances a misrecital of the proper county in the caption of an indictment furnishes no ground for arrest of judgment. Again, the entitling an indictment in a county to which other counties are attached for judicial purposes, rather than in all the counties so attached together, is a defect of form merely, and an indictment will not be set aside on this ground.

29. Kilgore v. State, 73 Ark. 280, 83 S. W. 928; State v. Lane, 26 N. C.

30. State v. Moore, 24 S. C. 150, so holding where the name of the county was left blank as follows, "the jurors of and for the county of aforesaid, on their oaths present." The indictment was headed with the name of the State and county, and alleged the county in which, and the court house at which, the court was holden.

31. Lusk v. State, 64 Miss. 845, 2 So. 256, holding that such a defect was not affected by a code provision that "no judgment in any criminal case shall be reversed because the transcript of the record does not

show a proper organization of the court below or of the grand jury.

. . . Nor shall any such judgment be reversed because of any error or omission in the case in the court below, unless the record shows that the errors complained of were made a ground of special exception in such court." Miss. Code of 1880, § 1433.

32. State v. Lane, 26 N. C. 113, so holding where it was not stated that the indictment was found in North Carolina but the county, Edgecomb, was written in the margin of the bill.

.33. Kilgore v. State, 73 Ark. 280, 83 S. W. 928.

34. State v. Sprinkle, 65 N. C. 463.

35. State v. McCartey, 17 Minn. 76.

§ 158. As to time of finding indictment generally.— Although it is said in the earlier decisions that a caption should show with reasonable certainty the time and place when the indictment was found,36 yet the later authorities hold that the fact that the caption contains an erroneous statement as to the time when it was found is not a fatal defect which vitiates the indictment,37 or furnishes a ground for a motion to quash,38 the caption being no part of the indictment.39 Therefore a clerical error in the caption as to the date of finding an indictment is not fatal.40 So where an indictment duly charges the commission of an offense at a time before it was found and the date of its presentment appears by the record, an error in the date of the caption is immaterial.41 And a defect in the caption as to the time when it was found may be cured by amendment under a statute providing that "No indictment, complaint, return, process, judgment, or other proceeding, in any criminal case in the courts or course of justice, shall be abated, quashed, or reversed for any error or mistake, where the person or case may be rightly understood by the court, nor through any defect or want of form or addition; and courts and justices may, on motion, order amendments in any such case." 42

§ 159. Same subject—Effect of clerk's certificate.—Where the clerk's certificate shows that an indictment was properly returned and filed, an erroneous date in the caption is held to be

36. State v. Gary, 36 N. H. 359; Tenorio v. Territory, 1 N. M. 279; State v. Williams, 2 McC. (S. C.) 301.

37. George v. People, 167 Ill. 447, 47 N. E. 741.

38. State v. Jenkins, 64 N. H. 375, 10 Atl. 699.

39. United States v. Borneman, 35 Fed. 824.

40. State v. Mowry, 21 R. I. 376, 43 Atl. 871. See United States v. Borneman, 35 Fed. 824, holding, where a caption recited the date of finding as 1885, instead of 1888, that under the U.S. Rev. Stat., § 1025, the error was a clerical one, which was not fatal.

41. Commonwealth v. Brown, 116 Mass. 339, citing Commonwealth v. Smith, 108 Mass. 486; Commonwealth v Hines, 101 Mass. 33.

42. State v. Jenkins, 64 N. H. 375. 10 Atl. 699, construing N. H. Gen. Laws, ch. 260, § 13.

harmless.<sup>43</sup> And it has been decided in Massachusetts that an indictment which, taken in connection with the certificate indersed thereon by the clerk at the time of its return into court, distinctly shows the date of its presentment by the grand jury, and of the commission of the offense charged, is not invalidated by a defective description, in its caption, of the term of court at which it was found.<sup>44</sup>

§ 160. Should show jurisdicton of court generally.—In the early English cases it was decided that the caption should show that the court had jurisdiction and that it was a good objection to an indictment that it did not show this. And likewise it has been determined in the United States that the caption of an indictment should describe the court before which it is found, that it may appear that the court can exercise jurisdiction over the offense charged. And if by statute it is required that it should

**43**. State v. Robinson, 85 Me. 147, 26 Atl. 1092. See Commonwealth v. Smith, 108 Mass. 486.

44. Commonwealth v. Smith, 108 Mass. 486. Judge GRAY said: has already been held that an omission in the caption, of the date of holding the term, is immaterial, when the date of its presentment and return is stated in the clerk's indorsement, and the allegation in the indictment of the time of the commistion of the offense is consistent there-Commonwealth v. Hines, 101 Mass. 33. We are of opinion that a like rule applies to this case and that the statement, in the caption, of the year in which the court was held, may be rejected as inconsistent with the dates stated in the clerk's certificate and in the body of the indictment, and as manifestly erroneous."

45. King v. Fearnley, 1 Term. R. 316, holding that where the caption

of the indictment stated the court of quarter sessions, where the indictment was found, to have been held on an impossible day, it was fatal. King v. Roysted, 1 Keny. 255, holding an erroneous style of the sessions a sufficient cause for quashing an indictment.

46. State v. Kennedy, 8 Rob. (La.) 590; State v. Sutton, 5 N. C. 281; State v. Williams, 2 McC. L. (S. C.) 301. See Thomas v. State, 5 How. (Miss.) 20, holding that the style of the court should be stated in the caption.

See following sections as to necessity of describing court in caption.

A statement in the body of an indictment as to the court in which it was found is not required where it sufficiently appears in the caption. Dean v. Tennessee, Mart. & Y. (Tenn.) 127.

Where the record showed that an

appear from the indictment that it was presented in a court having jurisdiction, it is essential that there be a sufficient description of the court to show such fact.<sup>47</sup> The objection, however, that the caption does not state the name of the court cannot, it is held, be raised by demurrer.<sup>48</sup> In Louisiana it has been decided that indictments need not describe the court before which they are found nor the jurors by whom they are found, nor need they aver that the court had jurisdiction of the offense.<sup>49</sup>

§ 161. Same subject—No statement in caption—Sufficient if record shows jurisdiction.—Although it may be stated generally that the caption should show that the indictment was returned to a court having jurisdiction and the earlier cases were authority for the doctrine that a failure to show such fact was fatal, 50 yet it is a general rule that though a caption omits to show jurisdiction it will be sufficient if it appears from other parts of the

indictment was found by a grand jury at a regular term of the "City Court of Selma" it was held not to be a valid objection that in the caption the words "City Court" only were used. Harrison v. State, 55 Ala. 239; Bonner v. State, 55 Ala. 242.

Sufficiency of caption as to name or description of court.— See following cases as to sufficiency of caption in particular cases:

California.—People v. Conner, 17 Cal. 354.

Dakota.—Territory v. Pratt, 6 Dak. 483, 43 N. W. 711.

Massachusetts.—Commonwealth v. Fisher, 7 Gray (Mass.), 492.

New Jersey.—Berrian v. State, 22 N. J. L. 9; State v. Price, 11 N. J. L.

North Carolina.—State v. Jeffreys, 1 Tayl. 126.

Texas.—Mathews v. State, 44 Tex.

376; Giebel v. State, 28 Tex. App. 151, 12 S. W. 591.

Wisconsin.—Mau-zau-mau-ne-kah v. United States, 1 Pin. 124, 39 Am. Dec. 279.

47. Mathews v. State, 44 Tex. 376. See Hauck v. State, 1 Tex. App. 357, holding that even in such a case a failure to designate the court in which the indictment was presented is not sufficient to warrant a reversal of judgment for the reason that it is a mere matter of form, and could have been cured by amendment if the objection had been pointed out at the proper time.

48. State v. Meinhart, 73 Mo. 562.

49. State v. Marion, 15 La. Ann. 495, citing State v. Kennedy, 8 Rob. (La.) 591; State v. Peterson, 2 La. Ann. 921; State v. Gorner, 6 La. Ann. 311.

50. See preceding section.

record that the indictment was returned to a court having jurisdiction.<sup>51</sup> So an indictment is not vitiated by an erroneous description of the court in the caption where the record accompanying the indictment shows that the court in which it was found had jurisdiction.<sup>52</sup> And though the caption give an incorrect name to the court, yet since the caption forms no part of the indictment, an objection thereto on this ground will not be regarded where it appears from the records that the indictment was returned to a court of whose existence judicial notice can be taken.<sup>58</sup> So it has been decided that the designation in the caption of the court as "The District Court of United States," for the district of the territory, is at most a clerical or technical error, which does not vitiate the indictment.<sup>54</sup> Again, it has been decided that the omission of the word "court" in the caption of an indictment is immaterial, where the record shows the court into which the indictment was returned.55

State v. Blakely, 83 Mo. 359.
 See, also, Johnson v. Commonwealth,
 Ky. Law Rep. 835, 15 S. W. 662.

52. United States v. Upham, 2 Mont. 170. The caption in this case described the court as "the United States District Court of the Territory of Montana, for the Second Judicial District," and it was held that there was no "United States District Court" in the Territory of Montana.

**53.** State v. Daniels, 66 Mo. 192; Kirk v. State, 6 Mo. 469.

54. Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452, wherein Judge HAWLEY said: "We are clearly of the opinion that the use of the words 'of the United States' at most could only be considered a clerical or technical error. In no sense can it be held that the use of the words is such an error as would vitiate the indictment, or make all or any of the proceedings had there-

under null and void. The district court for the district of Alaska is not, strictly speaking, a court of the United States, and does not come within the purview of the acts of Congress which speak of 'courts of the United States' only. . . . But in a certain sense the district court for the district of Alaska is a United States court, and is often so designated. It was created by an act on Congress. It is not a State court."

- § 162. Same subject—Amendment of caption.—A caption which is defective in failing to show that it was returned to a court having jurisdicton may be subsequently amended by the court so as to show such fact. And it has been decided that an amendment of this character may be made at any time. So in an early case in South Carolina it was held proper for the court to give leave after conviction to amend the caption so as to show that it was found at a special court.<sup>56</sup>
- § 163. Names of judges.—In an early case in New Jersey it is said, "The books lay down the rule, and they are followed by the most approved precedents, that the names and style of office, of the persons constituting the court to which the indictment is presented, should be set out. The purpose is to show that they were competent to hold the court and had power to take the indictment." <sup>57</sup> And in an early decision in Mississippi it was declared that the caption of an indictment should state the name of the judge presiding. <sup>58</sup> It would seem, however, that where the court is sufficiently described or designated to identify it as the one to which the indictment was returned this would be sufficient and that the name of the judge or judges need not be given unless required by statute. <sup>59</sup>
- § 164. Time and place of holding court—Generally. Ordinarily the caption should contain a statement as to the time when and place where the court was held at which the indictment was found. 60 And it has been held that where the statute designation.

dictment was returned by the grand jury into that court at a term beginning on the day named in the caption, and duly filed therein.

State v. Williams, 2 McC. L.
 C.) 301.

57. State v. Zule, 10 N. J. L. 348. Per Ewing, J., citing 2 Hale C. C. 166; 1 Chit. Cr. Law, 331.

58. Thomas v. State, 5 How. (Miss.) 20.

59. Tenorio v. Territory, 1 N. M.

279. See, also, State v. Folke, 2 La.
Ann. 745; People v. Willson, 109 N.
Y. 345, 16 N. E. 540; Pennsylvania
v. Bell, Add. (Pa.) 155, 173.

Erroneous description of a justice in caption.—Objection on ground of, overruled. People v. Thurston, 2 Park. Cr. R. (N. Y.) 49.

**60. Alabama.**—Goodloe v. State, 60 Ala. 93.

Maine.—See State v. Conley, 39 Me. 78.

nates a place in the county in which court shall be held, the caption should show that it was held at such place, and that where it is not so stated, though the name of court and county are given, no presumption will be indulged in that it was held at the place designated.<sup>61</sup> A strict compliance, however, with this requirement is not necessarily essential, it being generally regarded as sufficient if either the body of the indictment or the record shows when and where the court was held.<sup>62</sup>

§ 165. Same subject—As to terms of court.—Where the terms of court are fixed by public law and the caption states that an indictment was found at a specified term of such court it

Mississippi.—Lusk v. State, 64 Miss. 845, 2 So. 256.

New Hampshire.—State v. Gary, 36 N. H. 359.

South Carolina.—State v. Williams, 2 McCord L. 301.

Tennessee.—Grandison v. State, 2 Humph. 451.

The county in which the court is held should be shown by the caption. Grandison v. State, 2 Humph. (Tenn.) 451; State v. Fields, Peck (Tenn.), 140; State v. Hunter, Peck (Tenn.), 166.

The place in the county where the court in which the indictment was found was held should be shown by the caption. Lusk v. State, 64 Miss. 845, 2 So. 256.

Form of caption held sufficient in this respect. "Commonwealth of Massachusetts, Essex, to wit: At the Court of Common Pleas, begun and holden at Salem within and for the county of Essex." This form has been held to sufficiently show that the indictment was found at a court held in the Commonwealth of Massachusetts. Commonwealth v.

Fisher, 7 Gray (Mass.) 492. See, also, State v. Conley, 39 Me. 78; Burgess v. Commonwealth, 2 Va. Cas. 483. The caption the "Cole Circuit Court" has been held to mean the circuit court of Cole county. State v. Weinhart, 73 Mo. 562.

Presumption as to place arising from statement in caption. -Where the caption to an indictment shows that on the first day of the term court was opened by one authorized to open it, at a time and place prescribed by law, and adjourned by him from day to day till the appearance of the judge, it will be presumed that it was held the balance of the term at the same place. The caption in such a case sufficiently shows the place where the indictment was Smith v. State, 9 Humph. found. (Tenn.) 9.

61. Carpenter v. State, 4 How. (Miss.) 163, 34 Am. Dec. 116.

62. Kilgore v. State, 73 Ark. 280, 83 S. W. 925. See People v. Willson, 109 N. Y. 345, 16 N. E. 540; State v. Moore, 24 S. C. 150, 58 Am. Rep. 241.

will be regarded as sufficient.<sup>63</sup> Where, however, the caption fails to show at what term of court an indictment was found, or imperfectly designates it, such omission or defect may be supplied by reference to parts of the record showing such facts,<sup>64</sup> or to the body of the indictment in which it is correctly stated.<sup>65</sup> And the statement in the caption in figures instead of words of the term at which an indictment is found is not a ground for reversal.<sup>66</sup> As to the form of the caption in regard to indictments for offenses committed before the term, it is said that the caption may be general and the time of finding the bill be properly stated as of the term.<sup>67</sup> And in the case of an indictment for an offense committed after the commencement of the term, it should appear from the caption the time when the term was begun and holden and that it was continued by adjournment to a day named, being after the time of the alleged offense.<sup>68</sup>

§ 166. Same subject—Reference to first day in stating term.

—An indictment purporting in the caption to have been found at a court holden on a certain day, which is the first day of the term, is good, although in fact found on a subsequent day of the same term. And an indictment was held not to be vitiated by the

63. State v. Gary, 36 N. H. 359.
 See, also, State v. Wentworth, 37 N.
 H. 196.

Giving the day on which an indictment was found has been held to sufficiently state the term of court. People v. Beatty, 14 Cal. 566.

**64.** Kirk v. State, 6 Mo. 469; United States v. Clark, 125 Fed. 92.

65. State v. Haddock, 2 Hawks (N. C.) 461, holding that it was sufficient where the term was described in the caption as "Fall Term 1822" and in the body of the indictment the time was stated as "on the 1st day of August, in the present year."

An indictment need not show on its face the term when found where that fact is shown by the back of the instrument. Nixon v. State, 121 Ga. 144, 48 S. E. 196, or appears from other parts of the record. State v. Granville, 34 La. Ann. 1088

66. Johnson v. State, 29 N. J. L.453. See, also, Barnes v. State, 5Yerg. (Tenn.) 186.

67. Commonwealth v. Gee, 6 Cush. (Mass.) 174. See State v. Wentworth, 37 N. H. 196.

68. Commonwealth v. Gee, 6 Cush. (Mass.) 174. See Commonwealth v. Stone, 3 Gray (Mass.), 453.

69. Commonwealth v. Hamilton, 15 Gray (Mass.), 480. See, also, Commonwealth v. Colton, 11 Gray (Mass.), 1.

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fact that it purported to have been found at the term begun and holden on the first Monday in July of a court which by law was required to begin and hold its term on the first Monday of every month, where it appeared that the first Monday of July was the fourth.<sup>70</sup>

- § 167. Name of offense.—It is not necessary to name or describe the offense in the caption of an indictment,<sup>71</sup> and if the name is stated or the offense described therein, and such statement or description is in conflict with that given in the indictment, the latter will control.<sup>72</sup>
- § 168. Name of defendant.—In an early case in Indiana it is decided that if the name of the defendant appear in the body of the indictment, the omission to name him in the title is a defect which cannot tend to prejudice his rights upon the merits. But in a more recent case in New Jersey it is decided that the name of the defendant need not appear in the caption to an indictment. The question as to the necessity of a statement of the name may also, as in the case of other formal matters, be subject to statutory provision. In this connection it has been decided in Iowa that it is not a valid objection to an indictment that on the face of it there is no title to the action and that the names of the parties are not set forth in such title as prescribed by the form given in the code. To
- § 169. Grand jury—Showing as to county.—The caption should show that the grand jury were of the county where the indictment was taken, <sup>76</sup> and where the offense is alleged to have
- 70. Commonwealth v. Chamberlain, 107 Mass. 209.
- **71.** Williams v. State, 47 Ark. 230, 1 S. W. 149.
  - 72. Howard v. State, 67 Ind. 401.
- **73**. Dukes v. State, 11 Ind. 557, 71 Am. Dec. 370.
- 74. State v. Parks, 61 N. J. L. 438,39 Atl. 1023. See People v. Walters,
- 1 Ida. 273, holding that a failure to state the title to the action in an indictment is not fatal, as defendant's rights are not thereby prejudiced.
- **75.** State v. McIntire, 57 Iowa, 264, 13 N. W. 286, construing § 4297 of Iowa Code.
- 76. Woodsides v. State, 2 How. (Miss.) 655; Tipton v. State, Peck

been committed,<sup>77</sup> and it is declared that where this is not shown it will be presumed that the court has proceeded without authority.<sup>78</sup> But it is not necessary to aver that the jury was legally selected from a particular county, such fact being sufficiently shown by the statement that the grand jury "were impaneled, sworn and charged to inquire within and for the body of" a specified county.<sup>79</sup>

(Tenn.), 308. See Stevens v. State, 76 Ga. 96, holding that the county for which the grand jurors were drawn and served was sufficiently shown by the heading, "Georgia, Liberty County."

As to sufficiency of caption in particular cases in showing as to county, see the following: Howell v. State, 4 Ind. App. 148, 30 N. E. 714, holding it to be sufficiently shown where the indictment began, "State of Indiana, Morgan County, ss.: In the Morgan Circuit Court, February Term, 189," and recited that "the grand jury of Morgan County upon their oaths do present," and there was a recital in the record that the indictment was returned "by the grand jury of Morgan County, Indiana, into open court." Jeffries v. Commonwealth, 12 Allen (Mass.), 145, holding it sufficient where the caption contained the words "Commonwealth of Massachusetts, Suffolk, to wit," and stated, after giving the name of the court, that the court was to be held in Boston on a specified day and there was a recital in the indictment that "the jurors of the Commonwealth of Massachusetts, on their oath present." Commonwealth v. Edwards, 4 Gray (Mass.), 1; Commonwealth v. Johnson, Thach. Cr. Cas. (Mass.) 284; Byrd v. State, 1 How. (Miss.) 163, holding it sufficient, where the caption contained the recital, "The grand jurors of the State of Mississippi, impanelled and sworn in and for the county of Warren," etc. People v. Rockhill, 74 Hun (N. Y.), 241, 26 N. Y. Supp. 222, 55 N. Y. St. R. 681.

77. Carpenter v. State, 4 How. (Miss.), 163, 34 Am. Dec. 116.

78. Carpenter v. State, 4 How. (Miss.) 163, 34 Am. Dec. 116. this case it was said: "Objections of a merely technical character may sometimes impede, instead of advancing, the cause of justice; and although courts of justice have very properly manifested a disposition to relax the rigor of ancient forms, where no injury could result to the accused, yet there must be some limit beyond which judicial innovations should not be permitted to advance. . . . It appears to me that it would be extending this principle too far to hold that the description of the grand jury in the record before us necessarily evidences the fact that they were selected from the county where the prisoner was charged with the offense." Per Smith, J.

79. Leonardo v. Territory, 1 N. M. 291; Keith v. Territory, 8 Okla. 307, 57 Pac. 834. See Fizell v. State, 25 Wis. 364.

§ 170. Grand jury—As to qualifications generally—"Good and lawful men."—Although it is decided in an early case in Tennessee that a caption which does not state that a grand jury of good and lawful men, was empanelled is defective, and that a judgment on the indictment must in such a case be arrested, so yet it may be stated that the authorities support the conclusion that strict accuracy is not required in averring in the caption the qualifications of the grand jurors or that they are good and lawful men, where the defendant has the facilities of ascertaining their qualifications. And where it is stated in the caption of the indictment that the grand jurors are "good and lawful men" this is held to be sufficient without alleging that they are householders or freeholders, a all the qualifications imposed by law are included in these words.

§ 171. Same subject—That grand jury summoned and returned.—It is not necessary that it should be stated in the caption, in express terms, that the grand jurors were summoned and re-

80. Grandison v. State, 2 Humph. (Tenn.) 451.

Compare Territory v. Pratt, 6 Dak. 483, 43 N. W. 711, holding that the objection that it does not appear that the jurors were impanelled, charged or sworn, cannot be raised for the first time after conviction.

81. Cornelius v. State, 12 Ind. 782. See Weinzorpflin v. State, 7 Blackf. (Ind.) 186; State v. Yancy, 1 Treadw. Const. (S. C.) 237; Turner v. State, 9 Humph. (Tenn.) 119; State v. McCarty, 2 Chand. (Wis.)

82. Bonds v. State, Mart. & Yerg. (Tenn.) 143, 17 Am. Dec. 795, wherein the court said that this statement comprehends every necessary qualification in such case presented by law. And it was also said that "It might be further observed

that as this indictment was found in a superior court, the statement of "good and lawful men" does not even seem to be absolutely essential." Citing 1 Chitty C. L. 333; 2 Hawk., ch. 25, § 126.

Presumption as to qualifications.—The statement in the record that the grand jurors were "good and lawful men, householders" of the proper county, creates a presumption that they possessed all the statutory qualifications. Willey v. State, 46 Ind. 363.

83. Beauchamp v. State, 6 Blackf. (Ind.) 299; Jerry v. State, 1 Blackf. (Ind.) 395; State v. Price, 11 N. J. L. 203; State v. Glasgow, Cam. & N. (N. C.) 38; Cornwell v. Tennessee, Mart. & Y. (Tenn.) 147; Bonds v. Tennessee, Mart. & Y. (Tenn.) 143.

turned as such.<sup>84</sup> The caption will be sufficient in this respect where it discloses enough to authorize the inference that the indictment was returned by a lawfully organized grand jury for the term at which it was presented.<sup>85</sup>

§ 172. Same subject—That grand jurors were sworn.—The caption need not show that the grand jury were sworn. So "If the caption omit to state that the grand jury in a superior court was sworn, it will be presumed that they were sworn; at least the recital in the indictment that the grand jurors were elected, empanelled, sworn and charged will be sufficient." The a case in New York it is decided that the omission of the words "then and there" after the statement in the caption that the grand jury were sworn and charged is fatal and that a motion in arrest of judgment should be granted.

§ 173. Same subject—As to number of grand jurors.— It is not necessary to state in the caption the number of grand jurors, it being held sufficient to state that the grand jury impanelled and sworn in and for the body of the county aforesaid

84. State v. Jones, 9 N. J. L. 357, 17 Am. Dec. 483, wherein the court said that the answer to an exception on this ground "is given by most, if not all, the precedents of captions to be found in the books." Citing 2 Hale P. C. 165; Foster, 3, Faulkner's Case, 1 Saund. 249; Arch. Cr. Pl. 6; Anonymous, 3 Salk. 191; State v. Gustin, 5 N. J. L. 746.

See, also, State v. Price, 11 N. J. L. 203, citing above authorities; Berrian v. State, 22 N. J. L. 9, 29, wherein it is declared that "It is not usual to set forth that the jurors were summoned, nor by whom, nor even that they were empanelled."

85. Epps v. State, 102 Ind. 539, 1 N. E. 491 citing Moore Crim. Law, § 472; Powers v. State, 87 Ind. 144; Heath v. State, 101 Ind. 512.

86. State v. Long, 1 Humph. (Tenn.) 386, affirming McClure v. State, 1 Yerg. (Tenn.) 206, and followed in Melton v. State, 3 Humph. (Tenn.) 389. See, also, State v. Kimbrough, 2 Dev. (N. C.) 431; King v. Morgan, 1 Raymond, 710.

But see State v. Fields, Peck (Tenn.) 140.

87. McClure v. State, 1 Yerg. (Tenn.) 206. Per CATBON, J., cited and followed in Melton v. State, 3 Humph. (Tenn.) 389, 394.

88. People v. Guernsey, 3 Johns. Cas. (N. Y.) 265, citing King v. Turneth, 1 Mod. 26, 2 Heb. 583, 1 Vent. 60; King v. Morris, 2 Stra. 901.

present the following bill of indictment.<sup>89</sup> But where the caption shows that the grand jury was composed of a number less than is necessary by law to act, an indictment found by such grand jury will be bad.<sup>90</sup>

- § 174. Same subject—As to names of grand jurors.—Although it is held in the earlier cases that the caption should show the jurors by whom an indictment was found, 91 yet as a general rule the later cases do not hold this to be one of the essentials to the sufficiency of the caption, 92 though it has been declared that if they do not appear in the caption they should appear in the record. 93 So the fact that the name of a grand juror in the caption does not correspond with his name in the panel is not a fatal objection to an indictment, 94 if it is in reality the same person. 95 Such a defect is amendable. 96
- 89. Young v. State. 6 Ohio, 435. It was said in this case that when the record says "grand jury" it is presumed to be a legal grand jury.
- 90. Fitzgerald v. State, 4 Wis. 395, holding that where the caption of an indictment represents that it was found by "the grand jurors of the State of Wisconsin, to wit, twelve good and lawful men," the indictment is had and a conviction thereon will be set aside.
- 91. State v. Williams, 2 McC. L. (S. C.) 301. See, also, Thomas v. State, 5 How. (Miss.) 20.
- **92**. People v. Willson, 109 N. Y. 345, 16 N. E. 540.
- In the body of the indictment it is unnecessary to state the names of the jurors by whom it was found. People v. Bennett, 37 N. Y. 117; People v. Haynes, 55 Barb. (N. Y.) 450. See State v. Murphy, 9 Port. (Ala.) 487.
  - 93. In Mahan v. State, 10 Ohio,

232, it is held that the caption should state the names of the jurors by whom an indictment was found or that at least the names should appear in some part of the record, and that if they do not so appear a writ of error will undoubtedly lie.

See § 137 herein.

- **94**. State v. Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.
- 95. State v. Norton, 23 N. J. L. 33.
- 96. State v. Norton, 23 N. J. L. 33, wherein the court said: "Admitting the names to be substantially variant, when there is no pretence that the persons named in the panel and in the caption are really different, but the difficulty consists in the misprision of the clerk in preparing the caption, the court will not permit the indictment upon that ground to be quashed. The caption is amendable." Per the Chief Justice.

§ 175. Reference to caption to cure defects in indictment.— The caption of an indictment, showing when, where and by whom the court was held, and who were elected and sworn as grand jurors, may be looked to, in aid of the indictment as a part of the record and need not be repeated in the body of the indictment.97 So the caption may properly be referred to in case of a defect in the commencement of the indictment, as showing in what court, at what term, by what grand jury, and in what county the presentment was made.98 And where the county and court have been properly described in the title of an indictment, it has been declared that it will operate to cure a defective description in the body.99 And where it is alleged in an indictment that the crime was committed in a certain county but the state is not named, it has been held to be sufficient if the state is named in the caption and upper marginal title. So in Massachusetts it has been decided that an indictment which purports by its caption to have been found at a court of common pleas for a specified county and charges an offense at a town named "in said county," alleges with sufficient certainty the place of the commission of the offense.2 And likewise, where the indictment charges the commission of the offense as on a certain day "in the year aforesaid," and the year

97. Noles v. State, 24 Ala. 672.

To show jurisdiction.—Reference may be had to the caption of an indictment for the purpose of determining whether jurisdiction existed on the part of the inferior court. Robinson v. Commonwealth, 88 Va. 900, 14 S. E. 627.

**98**. Gater v. State, 141 Ala. 10, 37 So. 692.

99. State v. Buralli, 27 Nev. 41, 71 Pac. 532, wherein Judge Talbor said: "A grand jury in regular organization and attendance upon a court is necessarily one within and for the county where the court is in session, and, where the county and court have been properly described in

the title, indictments have been sustained without the name of the county being stated in describing the grand jury in the body of the instrument."

Anderson v. State, 104 Ind. 467,
 N. E. 63.

2. Commonwealth v. Edwards, 4 Gray (Mass.), 1. The court said: "The name of the county being fully set forth in the caption thus returned as attached to the indictment, a reference thereto in the indictment as in said county' may properly be had, to find the county where the offense is alleged to have been committed." Per Dewey, J. See State v. Bell, 3 Ired. L. (N. C.) 506.

is stated in the caption, it is decided that the time is sufficiently stated.3

§ 176. Amendment of caption.—At common law the caption may be amended according to the truth.<sup>4</sup> And it is a general rule that the caption to an indictment or to an information may be amended, for the purpose of curing any error or defect therein.<sup>5</sup> So where the word "court" was omitted it was held proper to permit an amendment by the insertion of the omitted word.<sup>6</sup> And it is said that the caption of an indictment may be af-

3. State v. Paine, 1 Ind. 163.

4. State v. Society for Establishing Useful Manufactures, 42 N. J. L. 504, citing State v. Jones, 9 N. J. L. 357, 17 Am. Dec. 483, wherein it is held that the caption to an indictment may be amended after it has been removed to the Supreme Court by certiorari.

5. State v. Brennan, 2 S. D. 384, 50 N. W. 625, citing Bishop on Crim. Proced., §§ 661, 662, and also the following cases:

Missouri.—State v. Bennett, 102 Mo. 356, 14 S. W. 865.

New Hampshire.—State v. Jenkins, 64 N. H. 375, 10 Atl. 699.

New Jersey.—State v. Jones, 9 N. J. L. 357.

**Pennsylvania.**—Brown v. Commonwealth, 78 Pa. St. 122.

Vermont.—State v. Gilbert, 13 Vt. 647.

Wisconsin.—Allen v. State, 5 Wis. 329.

United States.—United States v. Thompson, 6 McLean, 56.

See, also, Brown v. Commonwealth, 78 Pa. St. 122, wherein it was held proper to amend a caption to an indictment after trial, conviction and sentence, and the court declared that

it would be a shame if it were not amendable. State v. Moore, 24 S. C. 150, 58 Am. Rep. 241; State v. Gilbert, 13 Vt. 647; State v. Emmett, 23 Wis. 632.

In State v. Moury, 21 R. I. 376, 382, 43 Atl. 871, it is said: caption is no part of the indictment proper, but is merely the ministerial act of the clerk or prosecuting officer. It is, therefore, amendable by reference to the records of the court in which it was found. . . . The caption is merely a formal statement, which, though placed at the head of the indictment, is still of no higher nature than is an entry on the docket made in court by the clerk (1 Bish. Crim. Pro., § 151); and to hold that a mere clerical error therein is fatal to the indictment which follows it would be both senseless and absurd. Indeed it is not even necessary to amend the caption, as was held in case in Massachusetts, where the court said it was sufficient if reference to the other records of the court showed the time of finding the indictment. Commonwealth v. Stone, 3 Gray (Mass.), 453." TILLINGHAST, J..

6. James v. State, 44 Tex. 314.

fixed by the clerk with a view to the perfecting of the record. The court may permit such an amendment to be made at any time. So it has been decided that it may give leave after conviction to amend a caption so that it will show that it was found at a special court, or that it was presented by the grand jury upon their oath. So in an early English case after verdict of guilty on an indictment for assault, the return to the writ of certiorari which had been issued at the instance of the defendant, was amended by inserting in the return of the caption the true time when, and the names of the justices before whom, the quarter sessions at which the indictment was found was holden, and the names of the jurors by whom it was found.

§ 177. Commencement of indictment—Generally.—The commencement of an indictment is to be distinguished from the caption, which, as has already been stated, forms no part of the indictment. The commencement of an indictment is but a recital of certain preliminary facts, only necessary to be stated in order to render the instrument intelligible of itself, without having reference to the files and records of the court where it was found. The commencement of an indictment may in some cases

7. People v. Myers, 2 Hun (N. Y.), 6.

8. State v. Williams, 2 McC. L. (S. C.) 301.

9. State v. Creight, 1 Brev. (S. C.) 169.

10. King v. Darley, 4 East. 174.

11. People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 451, wherein it was declared that "the form of an indictment in many of our own states, and which form is derived from England, is thus: 'The jurors of the people of the State of \_\_\_\_\_, in and for the body of the county of \_\_\_\_\_, upon their oath present,' etc. This is the commencement and all that it need contain." Per FULLERTON, J.

12. See § 149 herein.

13. State v. Freeman, 21 Mo. 481. Per Leonard, J.

The commencement of an indictment is as follows: "The jurors of the people of the State of \_\_\_\_\_\_, in and for the county of \_\_\_\_\_\_, upon their oaths present." etc. People v. Bennett, 37 N. Y. 117.

In State v. Nixon, 18 Vt. 70, 46 Am. Dec. 135, the following commencement was held sufficient: "The grand jurors for the people of the State of Vermont, upon their oath present."

As to the form of commencements generally it was said by Judge WILLIAMS in the case just cited: "The grand jurors in this State, as well as in Great Britain, are to in-

be amended, for the purpose of curing an omission or defect therein.<sup>14</sup> And it has been declared that if the caption sufficiently shows the facts which should ordinarily appear in the commencement of the indictment, it is sufficient, though the commencement be wholly omitted.<sup>15</sup>

quire for all offenses in the county for which they are returned. 2 Hawk. P. C., ch. 25, p. 229. They are to present in behalf of and for the sovereign power, which is considered as the prosecutor for all public offenses; and hence the style or language of the indictment is not uniform. In England, the form is: 'The grand jurors for our Lord the King on their oaths present;' in New York, 'for the people,' etc.; in Massachusetts, 'for the Commonwealth.' some cases this part of the indictment is used only to designate the jury, who present,-as 'The grand inquest of the United States for the district of Virginia;' 'The grand jurors of the United States in and for the body of the district of New York;' 'The grand jurors within and for the body of the county of,' etc.; and this latter is the form usually adopted in this State and in Connec-The better form, I think, is the one used in Georgia, found in 6 Peters, 528, 'The grand jurors sworn, chosen, and selected for the county of ----, in the name and behalf of the citizens of Georgia.' In this State, when we wish to designate the sovereign power, we usually say, The State of Vermont; but I apprehend it is as well to designate it by the term, The People. . . . We cannot, therefore, attach any importance to this objection to the indictment, considering it wholly immaterial

whether the indictment commenced by saying, The grand jurors for the county, or for the State, or for the people of the State; and that either mode would be conformable to approved forms."

In State v. Brooks, 94 Mo. 121, 7 S. W. 24, it was held that the following commencement was sufficient. "The grand jury summoned from the body of Taney County, Missouri, duly empaneled," etc. The court said: "While it would have been more formal if the indictment had read, 'The grand jury for the State of Missouri, summoned from the body of the county of Taney, duly empaneled,' etc., the omission to follow that form is not fatal, provided it sufficiently appears from the record that the indictment was preferred by a lawful grand jury in and to a court of comp tent jurisdiction, and this much does fully appear from the record in this case." Per Norton, J.

The statement of the name of the court in the commencement of an indictment has been declared to be useless if not surplusage. Bell v. Commonwealth, 8 Gratt. (Va.) 600.

15. State v. Freeman, 21 Mo. 481.

- § 178. Effect of clerical or grammatical errors.—Mere clerical or grammatical errors in the commencement of an indictment will not vitiate the instrument, unless they change a word or render the meaning obscure. So where an indictment commenced as follows: "The grand jurors within and the body of the county," it was held that the omission of the word "for" after the word "and" did not vitiate the indictment. 16
- § 179. Grand jury—Commencement should show county.— The commencement of an indictment should ordinarily show the county in which the grand jury was sworn and impanelled, that it may appear that there was jurisdiction in that body to find the indictment.<sup>17</sup> But in a case in Oklahoma, where it was al-

16. State v. Brady, 14 Vt. 353. The court said: "It is said to be a rule applicable to indictments, that mere clerical and grammatical errors do not vitiate, unless they change a word, or render the meaning obscure. 1 Chit. Cr. L. 196. The omission of the word 'for' in the introductory part of this indictment has done neither. It may have rendered the preceding word 'and' senseless and unmeaning, but can have no further effect. The grand jury within a county, where in regular organization and attendance upon the county court, are necessarily a grand jury both within and for the county." Per ROYCE, J.

See Brown v. State (Tex. Cr. App. 1903), 77 S. W. 12.

17. In State v. Kiger, 4 Ind. 621, it was held where an indictment was as follows, "State of Indiana, Delaware county, ss. In the Delaare Circuit Court, September Term, 1851. The grand jurors for the State of Indiana upon their oath present," etc., that it sufficiently appeared that the grand jury sworn and impaneled at

that term in Delaware county was meant. In Wise v. Kansas, 2 Kan. 419, 85 Am. Dec. 595, it was held indictment commencing an "State of Kansas, Chase County, ss.: In the District Court of the 5th Judicial District sitting in Chase County, April Term, A. D. 1863. The jurors of the Grand Jury of the State of Kansas duly drawn, empaneled, charged and sworn to inquire of offenses committed within the body of the County of Chase, and within the County of Marion, attached to said County of Chase for judicial purposes," sufficiently showed that it was found by a grand jury of the county of Chase. This case was decided under § 95 of Code of Cr. Proc., providing that "the indictment is sufficient if it can be understood therefrom, first, that the indictment was found by a grand jury of the county in which the court is held."

The words "body of the county" are not necessary, and their omission could prejudice no one. The recital in this case was that the

leged as error that the indictment did not show that it was presented by a grand jury selected in and for a specified county, the court said: "There is no reason in this contention. not necessary that all preliminary steps of drawing, selecting and empanneling a grand jury shall appear in an indictment, nor would a statement in an indictment that such steps had been taken be in any manner conclusive. The selecting and empanneling of the grand jury are matters that are done in court prior to the finding or presentation of any indictment, and such proceeding are recorded in the journals of the court, and the records of the court is the proper place to look for such proceedings, rather than in the formal parts of an indictment. The reasons that at one time existed for requiring these matters to be set forth in the indictment has long since ceased to exist." 18 But though such a showing may be necessary in the commencement of an indictment, yet it has been decided that an omission or defect in this respect may be cured by amendment. So where the grand jurors were described in the indictment as "duly elected, empanneled, sworn, and charged to inquire into and true presentment make of all offenses committed in the county of ----, in said state, cognizable in the district court in and for the county of Titus and state aforesaid," it was held that the indictment was defective, but that the defect could have been cured by amendment. 19

§ 180. Grand jury—Matters unnecessary to state.—It is unnecessary to state in an indictment the names of the jurors by whom it was found.<sup>20</sup> Nor need the number of grand jurors be

grand jury were sworn and charged "inquiring in and for the county of Dodge." Fizell v. State, 25 Wis. 364.

18. Jones v. Territory, 4 Okla. 45, 51, 43 Pac. 107. Per Burford, J.

19. State v. Hilton, 41 Tex. 565. In Davis v. State, 6 Tex. App. 133, this case was distinguished from the case at bar, and it was held that the following showed the county for which the grand jury acted: "In the name and by the authority of the State of

Texas, the grand jurors of the State of Texas, duly empanelled, charged, and sworn to inquire of offenses committed in the county of Montague, upon their oath present in the District Court for said county."

20. State v. Murphy, 9 Port. (Ala.) 487; Commonwealth v. Johnson, Thach. Cr. Cas. (Mass.) 284; People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551; People v. Haynes, 55 Barb. (N. Y.) 450.

Daib. (N. 1.) 400.

stated.<sup>21</sup> And it need not be stated that the grand jury was legally called before the court or where the session of the court or grand jury was held.<sup>22</sup> And it has been decided that the indictment need not allege the organization of the grand jury and the regularity of the proceedings after the jury were impanelled.<sup>23</sup> Again, it has been decided that where there is a recital in an indictment that the grand jurors were "empannelled, sworn and charged to inquire in and for the body of a specified county, time and place need not be laid to show when and where they were so sworn.<sup>24</sup> It has also been held sufficient to use the word "jurors" only, instead of "grand jurors" in the commencement of an indictment.<sup>25</sup>

The names of the grand jurors are a part of the caption and need not be introduced in an indictment. State v. Murphy, 9 Port. (Ala.) 487.

21. Young v. State, 6 Ohio, 485, holding that it sufficiently appears that an indictment was returned by the number of grand jurors required by law where the record states that the "grand jury, impanneled and sworn, in and for the body of the county aforesaid, presented the following bill of indictment against" the defendant named.

22. Harrington v. State, 36 Ala. 236.

23. United States v. Laur, 26 Fed. Cas. No. 15,579, 2 Lowell, 115. The court declared that "The signature of the foreman vouches for the regularity of the proceedings after the jury are empanelled, and the records of the court show the venire, etc." Per LOWELL, J.

At common law it should be stated in the commencement of an indictment that the grand jurors presenting the same were sworn as such. Chevarrio v. State, 17 Tex. App. 390,

citing 1 Bish. Crim. Proc., § 666; Whart. Cr. Pl. & Pr., § 95.

In Texas it is not necessary under the code that there should be a statement that the grand jurors were sworn. Chevarrio v. State, 17 Tex. App. 390.

24. Vaughn v. State, 4 Mo. 530. See, also, Fizell v. State, 25 Wis. 364, holding that an indictment sufficiently shows where the grand jury were sworn though the words "then and there" are omitted, where, after naming the State, county, court, presiding judge and term, it states that "the jurors of the grand jury," etc., "duly summoned, impaneled, tried, sworn and charged," etc.

25. State v. Pearce, 14 Fla. 153, holding that it was sufficient where an indictment commenced with the words "jurors of the State of Florida," instead of "grand jurors," where it appeared from other entries in the record that the indictment was found by the grand jury. See, also, United States v. Williams, 28 Fed. Cas. No. 16,707, 1 Cliff. 5, holding it sufficient where the jury was de-

§ 181. Showing as to presentment—Use of words "on their oath."—It should appear that the indictment was presented on the oaths of the grand jury, in the absence of a statute to the contrary.<sup>26</sup> But though the word "present" is omitted in the com-

scribed "the jurors for the said United States."

26. Illinois.—Curtis v. People, 1 Ill. 256, holding that under the Criminal Code as to time of making objections to want of form, an objection on this ground should be made before the trial.

Maine.—State v. McAllister, 26 Me. 374.

Missouri.—State v. Sanders, 158 Mo. 610, 59 S. W. 993; State v. Furgeson, 152 Mo. 92, 53 S. W. 427.

Texas.-Vanvickle v. State, Tex. App. 625, 2 S. W. 642, wherein the objection was raised that the indictment did not contain such a statement. The court said: "It will be noticed that there is a hiatus, or, more properly speaking, a total want of connection between the allegations with reference to the impaneling of the grand jury, and the facts stated with regard to the subsequent acts of John Vanvickle. The usual, ordinary words of accusation, to wit, 'on their oaths present,' it will be seen, are entirely omitted, and no similar or equivalent words are used or substituted. In short, whilst this paper shows a grand jury for Rains county were impaneled to inquire into crimes committed in said county, and whilst it shows that John Vanvickle did certain acts therein set out, it is not shown, nor is it anywhere alleged, that the said grand jury charge, aver, allege or accuse the said Vanvickle with doing those acts. There is no

connection between the impaneling of the grand jury and the statement made with reference to the acts of Vanvickle afterwards set out. It is certainly not stated that the grand jury charged or accused him with the commission of those acts and deeds. We are no where Then who did? informed." Per White, J. The indictment in this case commenced as "In the name and by the authority of the State of Texas: The grand jurors of the State of Texas, charged, impaneled and sworn to diligently inquire into and true presentment make of all crimes and offenses against the law committed within the body of the county of Rains and State of Texas-that one John Vanvickle, late of the county of Rains and State of Texas, with force and arms in the county of Rains," etc. Proceeding then to set out certain facts going to constitute the alleged offense.

England.—Rex v. Wilkes, 4 Burr. 2563.

Sufficiency of recital as to oath.—Where an indictment recites that the grand jury were "duly elected, tried, impaneled, sworn, and charged," this is sufficient to authorize the presumption that the proper oath was administered. Thomason v. State, 2 Tex. App. 550.

At common law it was essential that an indictment should allege upon its face that it was presented upon the oaths or affirmations of the mencement of the indictment, it is held to be sufficient where it appears from the record that it was presented.<sup>27</sup> And the use of the words "on their oaths present" in the commencement is not absolutely essential where it appears from the caption or record that the indictment was so presented.<sup>28</sup> And where the word

grand jurors. Vanvickle v. State, 22 Tex. App. 625, 2 S. W. 642; Chevarrio v. State, 17 Tex. App. 390, citing 1 Bish. Crim. Proc., § 666; Whart. Cr. Pl. & Pr., § 95.

In Texas it is not necessary under the code to state that the presentment was made on the oaths or affirmations of the grand jury. Chevarrio v. State, 17 Tex. App. 390.

An indictment "upon their oath, is sufficient. Commonwealth v. Sholes, 13 Allen (Mass.), 554; State v. Dayton, 23 N. J. L. 49, 53 Am. Dec. 270. See Commonwealth v. Johnson, Thach. Cr. Cas. (Mass.) 284, holding that the words "on their oath" are equivalent to the words "on their several oaths."

Where an indictment purports to be on the affirmations of the grand jurors, it has been decided that it must appear that they were persons entitled by law to take affirmations in lieu of oaths, or the indictment will be fatally defective. State v. Harris, 7 N. J. L. 361. The court, however, said in this case that "We are not disposed to favor exceptions of this kind, which have nothing to do with the justice of the case; and, were the question now to arise for the first time, we should hesitate before we gave it our sanction." This case cited and followed State v. Sharp, cited by KINSEY, C. J., in

State v. Rockafellow, 6 N. J. L. 341. But in a case in Massachusetts it is decided that an indictment purporting to be presented by the grand jurors "upon their oath and affirmation" need not state the reasons why any of the jurors affirmed instead of being sworn. Commonwealth v. Fisher, 7 Gray (Mass.), 492.

28. Potsdamer v. State, 17 Fla. 895, wherein it is decided that when the record shows that the members of the grand jury were duly sworn as such, and the caption of the indictment states that the jurors were "duly chosen, empaneled and sworn diligently to inquire, and true presentment make, in and for the body of the county," etc., "do present," etc., this is a sufficient statement that the presentment is "upon their oath."

See Byam v. State, 17 Wis. 145.

It has been held sufficient where it is stated that the jurors "impaneled, sworn and charged" make the presentment. The court said in this case: "The utmost accuracy of pleading and strictest ad-

"oath" is omitted in the clause "upon their oath present" it is proper to permit an amendment by inserting the word "oath." 29

§ 182. Necessity of averment as to grand jury in each count.—Where the statement in the commencement of an indictment contains a sufficient showing as to the grand jury, subsequent counts need not repeat such statement where there is a sufficient reference thereto.<sup>30</sup> And in an early case in Virginia it is decided that if in a bill of indictment with three counts, in the third count it is omitted to be stated that the grand jury "on their oath" present, the first two counts being regular in that respect, the objection is obviated by the fact that the record states, that the grand jury were sworn in open court.<sup>31</sup> But in Missouri it has been decided that in each count of an indictment there should be a recital showing that it was found by the grand jury.<sup>32</sup>

herence to form might possibly require the addition of the words 'upon their oaths,' but this would be but repetition. When the count contains other equivalent expressions, it cannot be that the omission is fatal. It is at most but a matter of inducement, and not of the substance of the accusation. The jurors returned that being impaneled, sworn and charged, they made the presentment. This was a presentment on oath. The jurors so understood it, and so must we." Per Dixon, C. J.

29. State v. Moore, 1 Ind. 548.

30. State v. Vincent, 91 Mo. 662, 4 S. W. 430, wherein it was held that a recital in the first count of an indictment that "the grand jurors of the State of Missouri, within and for the body of the city of St. Louis, now here in court duly empaneled, sworn and charged, upon their oaths, present," was sufficiently referred to by a recital in another count that "the grand jurors aforesaid, upon their

oath aforesaid." See Palmer v. People, 138 Ill. 356, 28 N. E. 130.

Insufficient reference.—In State v. McAllister, 26 Me. 374, it was decided where the first count in an indictment alleged that it was presented upon the oaths of the grand jurors that the third count, by the allegation that "the jurors aforesaid for the State aforesaid do further present" did not sufficiently refer to the first count so that the former would appear to be presented per sacramentum suum.

31. Huffman v. Commonwealth, 6 Rand. (Va.) 685.

32. State v. Wagner, 118 Mo. 626, 24 S. W. 219, wherein Judge Sheewood said that "to each count must be prefixed a statement that the jury super sacramentum suum ulterius presentant, and without such commencement the count will be bad. The following authorities fully support these positions: 1 Chitty on Criminal Law, 175, 249; 1 Bishop on

§ 183. Showing that prosecution is in the name and by the authority of the state.—It is not necessary that the commencement of an indictment should state that the grand jury accuse the defendant "in the name and by the authority of the state" where there is no particular form of indictment prescribed by statute which should be strictly followed and which so provides.<sup>33</sup> And under these conditions it is not essential that the commencement of an indictment should contain an express or formal averment to this effect where this fact is shown by other parts of the indictment or the caption,<sup>34</sup> or by the record.<sup>35</sup> And where the name of the state has been omitted it has been held sufficient where the name of the county is inserted in the margin or body of the indictment.<sup>36</sup> It is, however, generally regarded as essential that it should appear either from the indictment or the record that the prosecution is so conducted.<sup>37</sup>

Criminal Procedure (3 ed.), §§ 132, 426, 429; State v. McAllister, 26 Me. 374; Malone's Criminal Briefs, 34, and cases cited; State v. Langley, 10 Ind. 482; State v. Phelps, 65 N. C. 450; Wharton Cr. Pr. & Prac. (9 ed.), § 95."

33. Holt v. State, 47 Ark. 196, 1 S. W. 61. See Allen v. Commonwealth, 2 Bibb (Ky.), 210.

In State v. Devine, 6 Wash. 587, 34 Pac. 154, it was held in the case of an information entitled "State of Washington against" the defendants, that it sufficiently appeared that the prosecution was in the name of the State.

34. State v. Kerr, 3 N. D. 523, 58 N. W. 27, holding that it sufficiently appeared that the prosecution was so carried on where an indictment was entitled State of North Dakota v. A. B., and showed on its face that it was presented by "the grand jury of the State of North Dakota in and for the county of Griggs."

35. Savage v. State, 18 Fla. 909; Crutz v. State, 4 Ind. 385; State v. Thompson, 4 S. D. 95, 55 N. W. 725.

A formal statement in an indictment that it was found by authority of the State is not necessary, it being sufficient if it appears in the record that the prosecution is in the name of the State. Greeson v. State, 5 How. (Miss.) 33; State v. Johnson, Walk. (Miss.) 395.

It is enough that the prosecution is conducted by the proper law officer, acting under the authority and conducting the prosecution in the name of the government. Drummond v. Republic, 2 Tex. 157. Per Wheeler, J.

36. State v. Lane, 26 N. C. 113.

37. Savage v. State, 18 Fla. 909 holding it sufficient if the record shows that the prosecution was conducted in the name and by the authority of the State.

§ 184. Same subject —Effect of constitutional or statutory provisions.—Where it is provided by statute that an indictment shall commence "in the name and by the authority the people of the state," a compliance therewith sential and an indictment which does not so commence is had.<sup>38</sup> So in Texas it has been decided that. the constitutional provision that an indictment shall begin "In the name and by the authority of the state of Texas," it is a good objection to an indictment that it does not so commence.<sup>39</sup> But the general rule that it is not essential to the validity of an indictment that the commencement shall contain an express averment that the prosecution is in the name and by the authority of the state or commonwealth and that it is sufficient if the record, caption, or other parts of the indictment show this fact, 40 is not altered by a constitutional provision "that all prosecutions shall be carried on in the name and by the authority of the state or commonwealth.41 So in a case in

38. Whitesides v. People, 1 Ill. 21. The printing of an advertisement or business card at the top of an indictment does not render invalid an indictment which is by law required to commence. "In the name and by the authority of the State," and which does so commence atter the business card, as such card is no part of the indictment. West v. State, 6 Tex. App. 485, citing Winn v. State, 5 Tex. App. 621.

39. Brown v. State, 46 Tex. Cr. R. 572, 81 S. W. 718, holding that an indictment was fatally defective which commenced "In the name and the authority of the State of Texas," the word "by" being omitted. See Weaver v. State (Tex. Cr. App. 1903), 76 S. W. 564, wherein the omission of the word "the" before the word "authority" was held to be no ground of objection.

40. See preceding section.

**41.** Allen v. Commonwealth, 2 Bibb. (Ky.) 210; State v. Thompson, 4 S. D. 95, 55 N. W. 725.

Sufficiency of showing .-- An indictment alleging the presentment to be made "in behalf of said State of Iowa," and the caption to which was as follows: "The State of Iowa, Muscatine County," was held to show sufficiently that the prosecution was conducted "in the name, and by the authority of" the State of Iowa, as provided by the Constitution, Art. 5, § 6. Wrocklege v. State, 1 Iowa, 167. See State v. Thompson, 4 S. D. 95, 55 N. W. 725. And a constitutional provision that "The style of all processes shall be, The State of South Carolina," and that all prosecutions shall be carried on in the name and by the authority of the State of South Carolina, conclude and

Louisiana it was said in this connection: "The expressions which it is contended should be used in the indictment, occur in the constitutions of several states of the Union, and the point now presented has been so frequently decided in those states that it can scarcely be considered an open question. It has been repeatedly held to be sufficient compliance with the constitutional requisition, that the prosecution should appear to be conducted in the name of the state, and that a formal averment that it was found by the authority of the state was not essential to the validity of the indictment." 42 And where it is provided by statute that the indictment shall state in the commencement that "in the name and behalf of the citizens" of the state the grand jurors charge and accuse one of a crime, an omission to state such fact cannot be taken advantage of after the rendition of the verdict, where it is also provided that by statute that all exceptions which go merely to the form shall be taken advantage of before trial.43

§ 185. As to the offense.—In Minnesota it has been decided that neither a misnomer of the crime nor the omission to give it any name in the commencement of an indictment, will affect the validity of the indictment.<sup>44</sup>

"against the peace and dignity of the same," was held to be sufficiently complied with where an indictment commenced "South Carolina" and concluded against the peace and dignity of the "said State." State v. Anthony, 1 McC. L. (S. C.) 285.

**42**. State v. Russell, 2 La. Ann. 604. Per King, J. See State v. Valsin, 47 La. Ann. 115, 16 So. 768.

**43**. Horne v. State, 37 Ga. 80, 92 Am. Dec. 49.

44. State v. Howard, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. R. 403, 34 L. R. A. 178. Judge STUART said in this case: "The crime attempted to be charged in the indictment is 'of-

fering a bribe to a juror,' or, strictly speaking, causing a bribe to be offered to a juror. In the commencement of the indictment the crime is designated as 'bribery of a judicial officer.' This discrepancy is the first objection to the indictment urged by the defendant. An error in designating the name of the crime in the commencement of the indictment is an irregularity only. The charging part of the indictment must be alone considered in determining whether the indictment charges a public offense. If it states facts showing the commission of a crime by the defendant, the law determines its name and nature, and neither a misnomer of the

§ 186. Defects cured by reference to caption or other parts of indictment.—The omission of the name of the state in the commencement after the words "the grand jurors for the state of" is not a fatal defect where by reference to the caption or to other parts of the indictment it is clear that the prosecution was in the names of the state.45 And it has been decided that an indictment is good which purports to be found by "the grand jurors for the said state, sworn and charged to inquire for the said county" when the names of the state and proper county are stated in the margin.46 And where it was alleged in the commencement of an indictment that "the grand jurors for the state of Alabama upon their oaths present" and the name of the proper county was stated in the caption it was held that the proceedings were sufficiently certain, although it was not averred in the indictment that such grand jurors were selected, empanelled, sworn and charged to inquire for the body of the county.47

crime nor the omission to give it a name affects the validity of the indictment." Citing State v. Hinckley, 4 Minn. 261 (345); State v. Garvey, 11 Minn. 95 (154); State v. Coon,

18 Minn. 464 (518); State v. Munch, 22 Minn. 67.

45. State v. England, 19 Mo. 386.

46. Lawson v. State, 20 Ala. 65.

47. Morgan v. State, 19 Ala. 556.

#### CHAPTER VIII.

#### BODY OF INDICTMENT GENERALLY.

- Section 187. Construction of indictment generally.
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  - 189. Same subject; pronouns.
  - 190. Words to be construed according to usual meaning.
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  - 210. Effect of erasures or alterations.
  - 211. Effect of interlineations.
  - 212. Fatal defect in charging offense; alteration or interlineation; effect of plea or verdict.
- § 187. Construction of indictment generally.—Though it is said that in giving a construction to an indictment the obvious purpose of the pleader should have influence in the collocation of the sentences, 1 yet indictments are also subject to the application of the rule fortius contra proferentem, which rule is said to apply more strongly in criminal than in civil cases.<sup>2</sup> And where
  - 1. State v. Beasom, 40 N. H. 367. S. W. 399; Commonwealth v. T. J.
- Commonwealth v. The G. W. Megibben Co., 19 Ky. Law R. 291, 40
   Taylor Co., 19 Ky. Law R. 1334, 43
   S. W. 694.

it is doubtful in which sense a person of common understanding would interpret an indictment, it has been declared that the indictment will be regarded as insufficient.<sup>3</sup> So in charging the crime of larceny it should plainly appear on the face of the indictment that a larceny, and not a trespass, has been committed, and it has been decided that if the language used is capable of two interpretations, without doing violence to its terms, only one of which imports a charge of larceny, the indictment is bad.<sup>4</sup>

§ 188. Use of words which refer back.—If there is no necessary ambiguity in the construction of an indictment, it is said in an early English case that the court is bound not to create one by reading the indictment in such a way as to make it unintelligible. So where a word refers back it will be held to refer to the only antecedent which can make sense of the indictment, and not to a word which will render it unintelligible.<sup>5</sup> And in a case in New Hampshire it is decided that a term used may be referred to that antecedent which accords with the general tenor of the proceeding, whether it conforms to strict grammatical rules or not.6 So the word "said" has been held to refer to the next antecedent to it where there is no impediment to its being so referred arising from the sense and meaning of the whole indictment.7 The word "same" is, however, distinguished from the word "said" in this respect in that it always refers to the next antecedent.8

## § 189. Same subject-Pronouns.-In the case of the use of

- 3. People v. Williams, 35 Cal. 671.
- 4. People v. Williams, 35 Cal. 671.
- King v. Wright, 1 Adol. & El.
   434, 28 Eng. Com. Law, 214.
  - 6. State v. Beasom, 40 N. H. 367.
- 7. Sampson v. Commonwealth, 5 Watts & S. (Pa.) 385, holding that in such case the rule ad proximum antecedens fiat relatio, nisi imperiatur sententia applies. See Wilkinson v. State, 10 Ind. 372.
- 8. The relative "same" is said to always refer to the next antecedent and to thereby differ in this respect from "said," which only refers thereto when it seems to be consistent with and to support the meaning and intention as manifested by the other parts of the writing or instrument. Sampson v. Commonwealth, 5 Watts & S. (Pa.) 385, 388. Per Kennedy, J.

a pronoun in an indictment it has been declared that there is no rule of legal or grammatical construction, which necessarily requires that it shall relate to the last noun or nouns, mentioned for its antecedent, but that this is a matter which is governed by the sense and meaning intended to be conveyed. So in a case in Massachusetts it is decided that the pronoun "them" must be referred to that antecedent, to which the tenor of the instrument and the principles of law require that it should relate, whether exactly according to the rules of syntax or not. 10

§ 190. Words to be construed according to usual meaning.—Words in an indictment are to be construed in their common and usual acceptation, except those which have a technical meaning or are defined by law. So it was said by Lord Ellenborough in an early English case that Except in particular cases where precise technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use; or, that in indictments or other pleadings a different sense is to be put upon them than what they bear in ordinary acceptation. And if, where the sense may be ambiguous it is sufficiently marked

- Miller v. State, 107 Ind. 152, 7
   E. 898.
- 10. Commonwealth v. Call, 21 Pick. (Mass.) 515.
- 11. State v. Day, 52 Ind. 483, holding that an indictment for obstructing a highway by "unlawfully cutting a ditch alongside of, and making an embankment alongside of and across said highway," was not had by failing to allege the depth of the ditch and the height of the embank-State v. Messenger, 63 Ohio St. 398, 59 N. E. 105, holding that where an indictment under a statute prohibiting the carrying of a certain weight over certain roads in a vehicle having a tire "of three inches in width," alleged the carrying of such a weight "in a vehicle having a tire

of three inches and no more," such averment was certain to a common intent as meaning a tire three inches in width and was sufficient on demurrer. See Smith v. State (Neb., 1904), 100 N. W. 806, holding that words in an information are to be construed according to their ordinary meaning.

The word "until" in the clause "until the 29th of November" has been held to have an inclusive meaning where not only the presumed intention of consistency on the part of the framer of an information required that the word should be thus understood, but also the context warranted the adoption of such meaning. King v. Stevens, 5 East. 244.

by the context, or other means, in what sense they are intended to be used, no objection can be made on the ground of repugnancy, which only exists where a sense is annexed to words which is either absolutely inconsistent therewith, or being apparently so, is not accompanied by anything to explain or define them. the sense be clear, nice exceptions ought not to be regarded."12 So where the words used in an indictment to describe an offense are commonly used in a sense which does not import an offense, and they are used without any qualification, the indictment will be bad, though the same words, in a more strict and technical, sense, may describe a criminal act. 13 And where it was alleged in an indictment that defendant falsely pretended that "he had one small black mule," it was held that the word "had" was to be construed as an assertion of ownership.14 By the code or by statute in some states it is provided that such a construction is to be given to the words used in an indictment.15

- § 191. Where technical words are used.—In many cases the law has technical terms, which are descriptive of actions or of motives, which are not generally used in any other sense, and where these terms are used in an indictment they are to be read and understood in that legal and technical sense only, <sup>16</sup> as in the case of the word "smuggle," which is said to be a technical word having a known and accepted meaning. <sup>17</sup>
- 12. King v. Stevens, 5 East. 244, 259. See State v. Pratt, 14 N. H. 456, wherein this language is in part quoted with approval.
  - 13. State v. Parker, 43 N. H. 83.
  - 14. Franklin v. State, 52 Ala. 414.
- **15.** People v. Littlefield, 5 Cal. 355, 356; Smith v. State, 1 Kan. 365, 389.
- 16. State v. Parker, 43 N. H. 83; United States v. Claffin, 25 Fed. Cas. No. 14,798, 13 Blatchf. 178.
- 17. United States v. Claffin, 25 Fed. Cas. No. 14,798, 13 Blatchf. 178, wherein it was said of this word: "It

implies something illegal and is inconsistent with an innocent intent. The idea conveyed by it is that of a secret introduction of goods with intent to avoid payment of duty. As such it is used by itself alone and in the statutes even. It is used in section 4596 of the Revised Statutes, in a provision relating to seamen, where an 'act of smuggling' plainly is supposed to mean such an act as above described and none other. The word is used in the same technical manner in the English statute (16 and 17 Vict., c. 107, § 244), where it is

- § 192. Indictment must be in English language.—It may be stated as a general rule that judicial proceedings are to be conducted, preserved and published only in the English language. And a constitutional provision that the acts constituting the offense shall be stated in ordinary and concise language requires the use of the English language. 19
- § 193. Bad handwriting does not necessarily vitiate.—An indictment will not be quashed on account of bad handwriting, provided it is not illegible.<sup>20</sup> "If courts should make legibility and accurate chirography requisites of valid indictments, prisoners would more often escape for want of these requisites than by reason of their innocence. The law is well settled that verbal or grammatical inaccuracies, which do not affect the sense, are not fatal.<sup>21</sup> If the sense be clear, nice exceptions cught not to be regarded. And even when the sense or the word may be ambiguous, this will not be fatal, if it is sufficiently shown by the context in what sense the phrase or word was intended to be

deemed sufficiently descriptive of a particular illegal employment in a ship, to designate it as 'a smuggling ship.' This technical meaning of the word has taken the form of a statutory definition in the moiety act of June 22, 1874 (18 Stat. 186), where it is declared that the act of 'smuggling shall be construed to mean the act, with intent to defraud,' of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles, without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination." In this case the point was raised that averring the goods to have been smuggled and clandestinely introduced into the port of New

York from the republic of France was not the giving of such a statement as would enable the court to say that the original information was illegal. The objection, however, was not sustained.

18. People v. Ah Sum, 92 Cal. 648, 29 Pac. 680.

19. People v. Ah Sum, 92 Cal. 648, 29 Pac. 680, holding that an information for perjury in testifying falsely in reference to the sale of a lottery ticket, a photographic copy of which was contained in the information, without any allegation of its tenor in English, could not be said to be in ordinary language.

20. State v. Morris, 43 Tex. 372. See Dodson v. State (Tex. Cr. App. 1902), 66 S. W. 1098.

21. Whart. Cr. Plead. & Pr., §

used.<sup>22</sup> So where in an indictment for theft a letter in the name of the owner of the property would have been taken for an e, but for the fact that such letter had a dot over it, and the letter should have been an e the court declared that it would not reverse a case simply on account of a dot over a letter which may have gotten there entirely by accident, especially where the two names were very nearly *idem sonans*.<sup>23</sup> And where the name of the month in an indictment was so written as to read either February or Tebruary, it was held that standing in the connection it did to the remaining letters of the word and the court judicially knowing that the name of not one of the calendar months commenced with a T, it would naturally conclude that the letter was intended for an F, and that the defendant could not have been misled by it.<sup>24</sup>

§ 194. Stating dates—Use of figures.—Figures, the use of which in an indictment was at one time restrained by statute in England,<sup>25</sup> are said to be a part of the English language,<sup>26</sup> and the fact that they are used in expressing a date in an indictment is not ordinarily regarded as a ground of objection thereto,<sup>27</sup> although it would perhaps be more advisable to use words instead of figures. So in reference to the use of

273; Shay. v. People, 22 N. Y. 317;State v. Gilmore, 9 W. Va. 641; Statev. Hedge, 6 Ind. 333.

22. State v. Halida, 28 W. Va. 491. Per SNYDER, J., citing King v. Stevens, 5 East. 244, 260; 2 Hale's P. C. 193; State v. Edwards, 19 Mo. 674. 23. Hutto v. State, 7 Tex. App.

24. Wittens v. State, 4 Tex. App. 70. Judge White said: "The legislature has not, in providing the requisites for an indictment, established a standard of penmanship in which it must be prepared, as one of their number. The objection is hypercritical."

See Irwin v. State, 7 Tex. App. 109.

25. The rule in England restraining the expression of numbers by figures, was not a regulation of the common law, but made by a statute subsequently repealed. Kelly v. State, 3 Sm. & M. (Miss.) 518. The statutes requiring that all indictments should be in words at length were 4 Geo. 2, ch. 26, and 6 Geo. 2, ch. 14. See Lazier v. Commonwealth, 10 Gratt. (Va.) 708, 712.

26. Kelly v. State, 3 Sm. & M. (Miss.) 518, 525, citing State v. Hodgeden, 3 Vt. 431.

27. Iowa.—Winfield v. State, 3 G. Greene, 39.

Mississippi.—Kelly v. State, 3 Sm. & M. 518. figures in stating the date in an indictment is has been said: "It is certainly safer and more certain to set out dates in an indictment in words instead of figures. Figures are more easily altered than words, and are more apt to be illegible, either from obliteration, or not being plainly made." <sup>28</sup>

§ 195. Use of abbreviations or Latin words.—Although it is the better practice in an indictment to write all the words in full,<sup>29</sup> the use of words or abbreviations which have a well defined meaning in the English language and may be said to have become English by adoption, is permissible. So it has been decided that an indictment is not defective by reason of the use of usual initials A. D. in stating the date,<sup>30</sup> or by the use of the words Anno Domini.<sup>31</sup> And where the abbreviation sd. was used for the word said it was held that there was no ground for arresting judgment though the court declared that imperfections of this kind were objectionable and to be avoided.<sup>32</sup>

Texas.—Earl v. State, 33 Tex. Cr. 570, 28 S. W. 469.

Vermont.—State v. Hodgeden, 3 Vt. 481.

Virginia.—Lazier v. Commonwealth, 10 Gratt. 708.

See Commonwealth v. Hagarman, 10 Allen (Mass.), 401.

28. Lazier v. Commonwealth, 10 Gratt. (Va.) 708, 712. Per Moncure, J.

29. Brown v. State, 16 Tex. Cr. App. 245. See, also, Walton v. State, 29 Tex. App. 527, 16 S. W. 423.

30. State v. Hodgeden, 3 Vt. 481, so holding in case of the use of "A. D. 1830." The court said: "On inspection of this indictment, we perceive that the characters and figures used, are such as are in common use among us, and have been so from time immemorial. They are such as all persons who write, and read writing, read

and understand alike. They are so plainly written, according to the accustomed form of these characters and figures, that no two persons at all familiar with our daily manuscripts could read and understand them differently. . . . While our statute requires our judicial proceedings to be in the English language, it requires this alike in civil cases and criminal. And these initials and figures have ever been used in civil proceedings in this State. They seem to be incorporated into our English language, and become a part of it, as well understood as any other part of it." Per Hutchinson, J. See State v. Reed, 35 Me. 489, 58 Am. Dec. 727; Commonwealth v. Clark, 4 Cush. (Mass.) 596.

31. State v. Gilbert, 13 Vt. 647.

32. Commonwealth v. Desmarteau, 16 Gray (Mass.) 1.

## §§ 196, 197 Body of Indictment Generally.

§ 196. Use of signs.—The use in an indictment of the sign which is ordinarily and frequently used for the word "and" does not render the indictment defective. And this is also true in case of the use before figures of the sign ordinarily used to indicate dollars. But in a case in Vermont it is decided under a statute requiring declarations and other pleadings to be drawn in the English language that the signs of degrees and minutes commonly used to show the meaning of figures with which they are connected are not a part of the English language within the meaning of such statute, and an indictment, for not making a highway pursuant to an order of court, in which these signs were used instead of words was held to be bad on demurrer. 35

# § 197. Requisites and sufficiency of indictment generally.— Though it is declared by statute that an indictment is the "writ-

33. Pickens v. State, 58 Ala. 364; State v. McPherson, 114 Iowa, 492, 87 N. W. 421; Commonwealth v. Clark, 4 Cush. (Mass.) 596; Walton v. State, 29 Tex. App. 527, 16 S. W. 423; Brown v. State, 16 Tex. Cr. App. 245. In the latter case the court "This style of abbreviation has come down to us sanctioned by age and common use for perhaps centuries, and is used even at this day in written instruments, in daily transactions, with such frequency that it may be said to be a part of our language when it is written." WHITE, J.

34. Earl v. State, 33 Tex. Cr. 570, 28 S. W. 469. As to this it was said: "Throughout the Union, in all financial transactions expressed in writing, it is and has been the habit, practice and custom of all the people to so express values. Among those nations of the world where our money circulates, or is the subject of ex-

change, in commercial dealings had with the citizenship of this country, these marks are thoroughly appreciated and their meaning fully understood. If there is one thing fixed beyond doubt in the mind of the American people it is the meaning of figures prefixed by the dollar mark. . . . The dollar mark conveys an unquestioned meaning. Everybody understands its significance. It is a part and parcel of our language, and peculiarly and originally an American contribution to the language of the world. In view of these matters, would it not be strange indeed that our courts should be required to be ignorant of the purport and meaning of Arabic numerals, so long anglicized, and the significance of the dollar mark, native and original to the United States, and peculiarly our own invention." Per Davidson, J.

35. State v. Jericho, 40 Vt. 121, 94 Am. Dec. 327.

ten statement" of the grand jury, this does not render invalid an indictment which is partly written and partly printed, the word "writing" being regarded as including printing.<sup>36</sup> And though a part of an indictment is written with a lead pencil, it would seem that in the absence of a statute it would not vitiate it.<sup>37</sup> And it has been decided that an indictment consisting of two papers pinned together and returned into court as one bill, the two charges being numbered first count and second count is not objectionable, though such papers had been returned as separate indictments and at different terms, it being declared that they could be treated as different counts in the same bill, if germane.<sup>38</sup> Nor will an indictment be vitiated by writing upon its back which in no way affects its validity.<sup>39</sup> And an immaterial defect in an indictment will not vitiate it.<sup>40</sup>

36. O'Bryan v. State, 27 Tex. App. 339, 11 S. W. 443.

37. May v. State, 14 Ohio, 461, 45 Am. Dec. 548, holding that the addition of a letter in pencil mark before the indictment was found by the grand jury did not vitiate it. court said: "It is the substance of the form, and not its shadow, to which it is important to adhere. The court might not feel disposed to tolerate the practice of drawing an entire indictment with a lead pencil, because it is more liable to be effaced and obliterated, than if drawn with ink; but there is no statute in Ohio, nor any rule of common law, nor any principle of ordinary sense, that will avoid an indictment, merely because one letter in the whole indictment is added to some one word in pencil, and that letter making no difference, neither in sound, sense, nor effect, in the word to which it is An indictment is usually written, but it may be printed, and is, nevertheless, valid. It is commonly drawn, with black ink; but if written in red, blue or yellow, who is bold enough to say that it is such a departure from usage that it vitiates the indictment? We apprehend no one." Per Wood, J.

**38.** State v. Robbins, 123 N. C. 730, 31 S. E. 669, 68 Am. St. Rep. 841.

39. Baker v. State, 28 Tex. App. 5, 11 S. W. 676, so holding where there was printed on the back of the indictment the following: "Certified copy of indictment, class No. 2," but the indorsement was not signed by anyone.

40. State v. Johnson, 37 Minn. 493, 35 N. W. 373, holding that putting the date when and the place where the indictment was found at the end of the instrument after the words "against the peace and dignity of the State of Minnesota," did not vitiate it. "The words are no part of the indictment; their pres-

§ 198. Following precedent or statute.—To avoid imperfections in an indictment it would be the better practice to follow some approved precedent.<sup>41</sup> And where by statute or code the requisites of an indictment are specified, the pleader should be guided by them and not by the rules of the common law.<sup>42</sup> And in determining the sufficiency of an indictment under a statute requiring the courts not to hold an indictment insufficient for any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant it was said: "It is some-

ence adds nothing to it, their absence would take nothing from it; it is concluded before those words are reached." Per GILFILLAN, J.

See §§ 199, 200, post, herein.

41. Davis v. United States, 16 App. (D. C.) 442, wherein the court said in regard to the sufficiency of an indictment: "Whatever might be thought of the form of the indictment, if it were now for the first time to be passed upon, that form has been so long accepted, and so often approved by the courts of this District, that nothing short of an apparent danger that it might operate to the prejudice of the defendant, would justify a disturbance of the settled practice." Per ALVEY, J.

Following precedents.—"While the better rule in preparing indictments and informations is to follow approved precedents when it can be done, they are not necessarily defective because they fail to do so, but if they contain all necessary averments, though couched in different language from approved forms and precedents, they will be held good." State v. Privitt, 175 Mo. 207, 225, 75 S. W. 457. Per Burgess, J.

42. Madden v. State, 1 Kan. 340,

wherein it is said in this connection: "It is to be regretted that those who have occasion to plead under the code so often attempt to unite the simple rules of the code with the complex and cumbersome forms of the common law. Either may be good enough of itself, but from their very nature both ought not to be attempted in one case; and it is from the vain effort to do so that most of the difficulty arises in determining upon the sufficiency of the pleadings. The nice technicalities and fine-spun and often arbitrary distinctions of the old system will not harmonize with the 'plain and concise language' which the code requires in stating the facts constituting an offense." Per KINGMAN, J.

Compare Kennedy v. People, 39 N. Y. 245, declaring that a statute defining murder in the first degree, murder in the second degree, and manslaughter, has not changed the form of pleading so that an indictment for murder, good at the common law, is no longer sufficient, and that the statute is not a rule of pleading, but a guide to the conduct of the trial and to the instructions to be given to the jury.

what difficult to say what is form and what is substance, in an indictment. A nice critic might insist that form is substance in criminal pleading, but the statute is intended to have some operation, and I have been disposed to give it a liberal construction. I have held that a particular intent, which made an act a crime by the words of a statute, is part of the substance. On the other hand, mere mistakes, however serious, in expressing the substance of a crime, if the meaning can be understood, I look upon as formal." <sup>43</sup>

§ 199. Strict adherence to form—Early English rule—Not generally followed now.—Although in the early English cases courts were inclined to adhere strictly to form and to hold an indictment defective where there was not such an adherence, although the departure was a trivial one yet the courts have in modern times to a great extent done away with this practice, and have not allowed mere clerical or technical errors, such as the omission of a letter in a word or of a word itself to vitiate an indictment, where such omission does not operate to change the word into another of different meaning or to render vague or unmeaning the statement intended to be made. So it has been said in this connection: "Formerly in England, the judges felt themselves constrained to adhere so strictly to form, that public justice was in many cases evaded, and the most dangerous malefactors let loose upon society, in consequence of the omission of some senseless and unmeaning form. A more correct and just appreciation of criminal justice has banished from the English courts these legal absurdities, which answered no other purpose than to protect and screen the guilty from the just punishment of their crimes. They will no longer permit the guilty man to escape punishment by averring that he cannot comprehend, and does not understand, what is palpable and evident to the common sense of everybody else." 44 So where an indictment charged that

<sup>43.</sup> United States v. Jackson, 2 Fed. 502.

**<sup>44.</sup>** State v. Hornsby, 8 Rob. (La.) 554, 557, 41 Am. Dec. 305. Per Nicholls. J. See Caha v. United

States, 152 U. S. 211, 38 L. Ed. 415, 14 Sup. St. 513: Rex v. Harris, 7 C. & P. 416, holding that the word "guilder" is sufficiently an English word to justify its use in an indict-

a mortal blow caused "an extravasion" instead of an extravasation of blood, it was held that the omission of the letters was not a fatal defect, and this even though the constitution required all indictments to be couched in the language of the constitution and by such omission the word was changed to a French word of the same meaning as that intended to be used. And a mistake in spelling the name of the place where it is alleged the offense was committed has been held not to render an indictment bad, the names being clearly idem sonans. But in a case in Missouri in which it was held that an indictment was fatally defective in charging that the accused did "wilfully and contemptuously disturb a congration of people met for religious worship," the court declared that there was no policy in encouraging carelessness or laxity in criminal pleadings.

§ 200. Rule generally as to defects and infirmities.—It has been said that though an indictment may not be very cleverly

ment as a translation of the Polish word "zlotych," which is also called a guilder and a florin.

See sections following herein as to application of the principles stated in the text.

**45**. State v. Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305. See § 204 herein as to errors in spelling.

46. Commonwealth v. Desmarteau, 16 Gray (Mass.) I, holding that the misspelling of the name of the town of Chicopee, by adding "k" to the first syllable, was no ground for arresting the judgment.

47. State v. Mitchell, 25 Mo. 420. The court said in this case: "When any departure from the required form is tolerated, it, instead of being regarded as a beacon to warn the pleader of danger, is instantly seized upon as a precedent and urged as a reason why there should be a greater

relaxation of the rule requiring the observance of forms. In this way the courts will be led, step by step, to the subversion of all order in the administration of the criminal code. When a man is called upon to defend himself against the charge of having violated the law, it is not unreasonable that he should require the accusation against him to be in sensible . The letters composing 'congration' do not make an abbreviation commonly used in our language. Nor do they make an abbreviation which is commonly used for the word 'congregation.' 'congration' is not an abbreviation then it is no word at all known to our language. . . . It is an absurdity to say that a man disturbed 'congration' of people." Scott, J.

drawn, yet if there is no substantial infirmity therein it will be sufficient.48 So it has been declared that though an indictment may be subject to verbal and grammatical criticism, and though there may be an awkward use of words and clumsy construction of some of the sentences, yet it may be good at common law, and being so would doubtless be good under a code provision that the offense be "charged in plain and intelligible words." 49 fore, though the part of the indictment which is descriptive of the offense, especially a statutory offense, may not be accurately drawn or verbally correct, yet if it is so drawn as to sufficiently show what is intended to a person of ordinary understanding it will be legally sufficient.<sup>50</sup> So in the case of an indictment for unlawfully operating a slot machine it was declared that the fact that the indictment in the accusative part did not show that the slot machine was a contrivance ordinarily used for gambling was not sufficient to vitiate it where the other facts stated in the accusative part were sufficient to apprise a person of ordinary understanding of the precise offense charged.<sup>51</sup> But where there is an unmeaning accumulation of words used in describing an offense it will be fatal, and it has been decided that a judgment rendered in such a case will be reversed.<sup>52</sup>

§ 201. Use of ungrammatical language.—Though an indictment may be couched in ungrammatical language this will not of

48. Heath v. State, 101 Ind. 512. **Defects which do not tend to the prejudice** of the accused do not render an indictment insufficient, where they are defects in matter of form merely. Caha v. United States, 152 U. S. 211, 38 L. Ed. 415, 14 Sup. Ct. 513.

49. Dawson v. State, 33 Tex. 491. 50. Bergen v. People, 17 Ill. 426; Paducah & Elizabethtown R. R. Co. v. Commonwealth, 80 Ky. 147; State v. Bloor, 20 Mont. 574, 52 Pac. 11; Dawson v. State, 33 Tex. 491.

51. Commonwealth v. Schatzman,

26 Ky. Law Rep. 508, 82 S. W. 238.

52. Sparks v. State, 35 Tex. 349, so holding in the case of an indictment for the theft of four beef steers from the possession of one J. P. Cox, "without his consent, intent to deprive him, the owner, of the value of the same, and to appropriate the to the use himself, the said George Sparks." Judge Ogden said: "We are surprised that a district judge should permit a trial and conviction in his court upon an indictment so faulty and full of nonsense."

itself render the indictment insufficient, provided the intention and meaning of the pleader is clearly apparent.<sup>53</sup> So it is said in one case in which an objection on such a ground was raised, "The grammatical and critical objections, however ingenious and acute they may be, cannot prevail. The age has gone by when bad Latin or even bad English, so it be sufficiently intelligible, can avail against an indictment declaration, or plea." <sup>54</sup> And in an early case in South Carolina it was declared that "It is sufficient if the idea is clearly and distinctly expressed; for neither clerical nor grammatical errors will vitiate, unless they change the word or obscure the meaning." <sup>55</sup>

§ 202. Mistakes which are merely clerical.—It is a general rule that an indictment is not vitiated by mistakes which are merely clerical, where they do not destroy the sense of the indictment and the meaning is apparent.<sup>56</sup> So a clerical error in writing

53. Alabama.—Pond v. State, 55 Ala. 196, holding an indictment sufficient which charged that the defendant "broke into and entered the store house of R. D., with the intent to steal, where there was, at the time of such breaking and entering into said storehouse, goods, merchandise or other valuable things, was kept for use."

Iowa.—State v. Pennell, 56 Iowa, 29, 8 N. W. 68.

Kentucky.—Newman v. Commonwealth, 28 Ky. Law Rep. 81, 88 S. W. 1089.

Montana.—State v. Bloor, 20 Mont. 575.

**Pennsylvania.**—Perdue v. Commonwealth, 96 Pa. St. 311.

South Carolina.—State v. Wimberly, 3 McC. L. 190.

Texas.—Wilson v. State (Tex. Cr. App., 1905), 90 S. W. 312.

West Virginia.—State v. Halida, 28 W. Va. 499.

54. Commonwealth v. Call, 21
Pick. (Mass.) 515. Per Moeton, J.
55. State v. Wimberly, 3 McC. L.
(S. C.) 190. Per Johnson, J.

**56. Arkansas.**—Evans v. State, 58 Ark. 47, 22 S. W. 1026.

Mississippi.—Greeson v. State, 5 How. 33.

Missouri.—State v. Turlington, 102 Mo. 642, 15 S. W. 141; State v. Eaton, 75 Mo. 586; State v. Rogers, 37 Mo. 367.

New York.—People v. Gilkinson, 4 Park. Cr. 26.

South Carolina.—State v. Wimberly, 3 McC. L. 190.

Texas.—Martin v. State, 40 Tex. 19; Chessley v. State (Tex. Cr. App. 1903), 74 S. W. 548; Freeman v. State, 44 Tex. Cr. 496, 72 S. W. 1001; Peters v. State (Tex. Cr. App.), 23 S. W. 683.

a name in an indictment cannot be invoked as violating the proceeding.<sup>57</sup> And where the name of the accused in the indictment is originally correct and in subsequent allegations where the name is referred to as the "said" named party, it is sufficient, even though the name of the accused is not subsequently correctly set out.58 So where the property feloniously taken was laid in one clause of an indictment as the property of Richard, but was afterwords recited as the property of Robert it was held to be a mere clerical error and that an objection to the indictment on this ground could not prevail, the error being one which did not prejudice And where it was charged in an indictment for defendant.<sup>59</sup> murder that the defendant wounded the deceased on the 30th of August and that the deceased in consequence thereof languished until the first of September, on which day of August he died, it was decided that the insertion of August for September was manifestly a clerical mistake and not a sufficient ground for arresting Again, where words are used in an indictment the judgment.60

Virginia.—Commonwealth v. Ailstock, 3 Gratt. 650.

United States.—Hard v. Stone, 5 Cranch C. C. 503.

The rule applies to informations.—People v. Duford, 66 Mich. 90, 33 N. W. 28. So where, in an information, the word "affiant" was used instead of the words "prosecuting attorney," which should have been employed, it was held that the defect was not available on a motion in arrest of judgment where the whole information taken together unmistakably showed that the charge was preferred by the proper officer. Billings v. State, 107 Ind. 54, 6 N. E. 914, 57 Am. Rep. 77.

Use of "or" instead of "and" is not a fatal defect unless it renders the meaning uncertain. People v. Gilkinson, 4 Park. Cr. (N. Y.) 26.

57. State v. Ford, 38 La. Ann. 797; State v. Morgan, 35 La. Ann. 293, wherein it was said: "The objection that the name of the signer of the order is not correctly transcribed in the indictment, because the last letter of the name is copied as an 'r' when that letter in the original appears to be a 'w' or 'n' or 'tt,' is evidently more fractious than serious. It would at most show a clerical error, which could not vitiate the proceedings." Per ROCHE, J., citing State v. Given, 32 La. Ann. 782.

58. Chessley v. State (Tex. Cr. App. 1903), 74 S. W. 548.

See chapter IX herein as to description of accused generally.

59. Greeson v. State, 5 How. (Miss.) 33.

State v. Eaton, 75 Mo. 586.
 See, also, Commonwealth v. Ailstock,

which are mere surplusage, they are to be disregarded and do not affect the validity of the indictment.<sup>61</sup> But where, in the charging part of an indictment, the name of the deceased was substituted for that of the defendant and the clause in which such substitution was made was the only one which alleged the infliction of the mortal wound upon the body of the deceased, it was decided that the mistake could neither be corrected or ignored, and that the indictment must be held to be fatally defective.<sup>62</sup>

§ 203. Use of wrong pronouns.—The use of a wrong pronoun will not vitiate an indictment. Thus it was so held where in an indictment against a single defendant charging the theft of a certain mare and colt, the pronoun "their" was used instead of the pronoun "his" in connection with the averment of appropriation and use. And the fact that an indictment against several defendants for keeping a disorderly house charged them with keeping it for his own lucre and gain," instead of their own lucre and gain, was held to be no ground for quashing the indictment when the making of gain was not necessary to render the practices carried on in the house illegal. And where an indictment contained two averments of perjury and in asserting the falsity it was alleged that defendant knew said "statements to be false when he made it," an objection to the indictment on the

3 Gratt. (Va.) 651, where a similar conclusion was reached where it was charged in an indictment that the wound was inflicted on the 7th of November, 1845, and that the deceased languished until the 8th of November in the year aforesaid, "on which said 8th of May in the year aforesaid, the deceased died." Compare State v. Craighead, 32 Mo. 561.

- 61. State v. Coleman, 8 S. C. 237.
- 62. State v. Edwards, 70 Mo. 480.
- 63. Snow v. State, 6 Tex. App. 284. See Commonwealth v. Call, 21

Pick. (Mass.) 515; Jackson v. State, 88 Ga. 784, 15 S. E. 677.

**64**. State v. Parks, 61 N. J. L. 438, 39 Atl. 1023.

In an indictment for the theft of a mare and a horse the use of the pronoun "it" in reference to them in alleging the intent has been held correct, such pronoun being declared to necessarily refer, both in grammatical and legal construction, to the property in the animals. Goodson v. State, 32 Tex. 121.

ground that the singular "it" instead of the plural "them" was used was declared to be hypercritical. 65

§ 204. Errors in spelling.—Errors in spelling do not vitiate an indictment where the meaning is not thereby changed or rendered obscure.66 So in a recent case in Texas it is said that "where the context of the indictment clearly indicates the intention of the pleader, and there can be no mistake as to his meaning, we will not hold an indictment bad for the lack of proper spelling or grammar." 67 And in a case in Indiana it is declared that it is hardly necessary to cite authorities to support a proposition so well settled and understood as that mere orthography will not vitiate an indictment. 68 In this connection it was also said in a case in Wisconsin in which an indictment was objected to on the ground that the word assault was spelled "assatt," "It is hardly possible to conceive that the defendant or his counsel could have been misled by the misspelling of the word 'assault.' Nor yet is there the slightest apology for the gross ignorance or gross carelessness of the person who drew the indictment, or of the clerk who may have copied it, or whomsoever the person may be who committed the blunder. An apology for such recklessness or ignorance on the part of one who pretends to rank as a member of a learned profession, is inconceivable. But gross and unpar-

65. Hollins v. State (Tex. Cr. App. 1902), 69 S. W. 594.

**66. Alabama.**—Bell v. State, 139 Ala. 124, 35 So. 1021; Grant v. State, 55 Ala. 201.

Indiana.—State v. Hedge, 6 Ind. 330; Wills v. State, 4 Blackf. (Ind.) 457.

North Carolina.—State v. Molier, 12 N. C. 263.

Oklahoma.—Smith v. Territory, 14 Okla. 162, 77 Pac. 187.

South Carolina.—State v. Coleman, 8 S. C. 237.

Tennessee.—State v. Myers, 85 Tenn. 203, 5 S. W. 377. Texas.—Francis v. State, 44 Tex. Cr. 246, 70 S. W. 751; Keller v. State, 25 Tex. App. 325, 8 S. W. 275; Somerville v. State, 6 Tex. App. 433.

West Virginia.—State v. Halida, 28 W. Va. 499.

Wisconsin.—State v. Crane, 4 Wis. 400.

See, also, the following section herein for further citations in support of rule stated in text and also illustrations thereof.

67. Francis v. State, 44 Tex. Cr. 246, 70 S. W. 451.

Lefler v. State, 122 Ind. 206,
 N. E. 154.

donable as the error is, it would be placing the defendant in a position of which he would be ashamed, to make it available to him. To do so would establish another and a more perfect defense, which he has not set up. He does not claim to be non compos mentis. Nor should the due administration of justice be delayed by such gossamer obstacles as this." <sup>69</sup> This rule especially applies where it is provided by statute that an indictment shall not be regarded as insufficient by reason of a defect or imperfection in the matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits. <sup>70</sup> This rule, however, is subject to this qualification, that the error in spelling must not be such as to obscure or change the meaning, <sup>71</sup> or to mislead the defendant. <sup>72</sup>

§ 205. Same subject continued—Illustrations.—The rule stated in the preceding section<sup>78</sup> has been applied in cases of misspelling such as "fraudelently" <sup>74</sup> or "fraudlently" for fraudulently; "gol" for gold, in describing money alleged to have been stolen; "defendants" for defendant; "too" for two, in stating the year one thousand eight hundred and fifty-two; "spiritual" or "spiritous" for spirituous, in an indictment for

**69.** State v. Crane, 4 Wis. 400, 402. Per SMITH, J.

**70**. Smith v. Territory, 14 Okla. 162, 77 Pac. 187.

71. State v. Earp, 41 Tex. 487.

72. State v. Crane, 4 Wis. 400.

73. See § 204 herein.

**74**. Bell v. State, 139 Ala. 124, 35 So. 1021.

75. State v. Earp, 41 Tex. 487.

76. Grant v. State, 55 Ala. 201, wherein it was said: "Neither clerical nor grammatical errors vitiate an indictment, unless they change the words or obscure the sense. It is simply impossible to read this indictment, and be in doubt as to the words intended, or their import. The omis-

sion of the letter 'd' from the word 'gold,' converting its into 'gol,' is a mere clerical error, or bad spelling, on the part of the pleader. The sense is not obscured. . . . The defendant, on the inspection of the indictment, or on hearing it read, would know that it was intended to charge him with larceny of ten twenty-dollar gold pieces of American coinage, and the court would with certainty understand that such was the accusation." Per BRICKELL, J.

77. Evans v. State, 58 Ark. 47, 22 S. W. 1026.

78. State v. Hedge, 6 Ind. 330.

79. State v. Clark, 3 Ind. 451.

the unlawful sale of spirituous liquors; 80 "stal" for steal; 81 "cash" for case; 82 "fourman" for foreman; 83 "guilts" for gilts; 84 "laden" for leaden; 85 where an indictment in charging the offense concluded "against the statue in such case made and provided," instead of "against the statute; 86 "sive" for sieve; 87 "mair" for mare in describing an animal stolen; 88 the use of the word "and" for an; 89 "shorting" for shooting; 90 "avocation" for vocation; 10 "inhabitance" for inhabitants; 10 "dring" for drink; 10 "against" for against in the conclusion; 11 "Janury" for January; 12 "eiget" for eight in stating the date of the alleged offense; 13 "gilding" for gelding; 14 where seventy-five was printed sunty-five and the word dignity was written without crossing the t, thus causing it to be spelled dignily, 10 and "assatt" for assault. 10 "stating the date of assault. 10 "stating the dignily, 10 stating the dignily 10 stating 10 stating 10

- § 206. Same subject—Contrary view.—Although it is, as we have stated, a generally accepted rule that an error in spelling
- **80.** Brumley v. State, 11 Tex. App. 114.
- **81.** Mills v. State, 4 Blackf. (Ind.) 457.
- 82. State v. Given, 32 La. Ann. 782, so holding in construing an information.
- 83. State v. Karn, 16 La. Ann. 183, holding the words are idem sonans.
- 84. State v. Lucas, 147 Mo. 70, 47 S. W. 1067, holding the words are idem sonans.
- 85. State v. Elkins, 101 Mo. 344, 14 S. W. 116.
  - 86. State v. Coleman, 8 S. C. 237.
  - 87. State v. Molier, 8 S. C. 263.
- 88. State v. Myers, 85 Tenn. 203, 5 S. W. 377.
- 89. Martin v. State, 40 Tex. 19, so holding where an indictment charged that the accused "did commit and assault" instead of "did commit an assault."

- 90. Francis v. State, 44 Tex. Cr. 246, 70 S. W. 451.
- 91. Peters v. State (Tex. Cr.), 23 S. W. 683.
- 92. Keller v. State, 25 Tex. App. 325, 8 S. W. 275.
- 93. Brumley v. State, 11 Tex. App. 114.
- **94**. Hudson v. State, 10 Tex. App. 215.
- 95. Hutto v. State, 7 Tex. App. 44.
- 96. Somerville v. State, 6 Tex. App. 433.
- 97. Thomas v. State, 2 Tex. App. 293.
- 98. State v. Halida, 28 W. Va. 499. The court said: "It is not difficult for a person of common or ordinary intelligence to read and understand the words and meaning of this indictment." Per SNYDER, J.
  - 99. State v. Crane, 4 Wis. 400.

will not vitiate an indictment where the meaning is not thereby changed or rendered obscure,1 yet there are several decisions in which it has been held that an indictment is fatally defective owing to an error in spelling such as "dwell-house" for dwellinghouse,2 "aforethou" for aforethought,3 "maice" for malice;4 "brest" for breast; "possion" for possession; and "appriate" for appropriate.7 Most of these cases, some of which are in apparent conflict with the general rule,8 are based upon the reasoning that where a certain word is material in an indictment it cannot be supplied by intendment, and that if some combination of letters is used which is unmeaning and it is not idem sonans with the word which should have been used, such an error is fatal. And in a case in South Carolina, in which the general rule that clerical or grammatical errors not affecting the sense of an indictment do not vitiate it is recognized, it is, however, declared that where the omission or addition of a letter makes a change of the word, so as to make another word, it becomes material when it occurs in certain parts of an indictment and that where such omission or addition occurs in setting out those material words of a statute, which must be pursued in describing a statutory offense, a want of necessary certainty is produced wherever the meaning is obscured, and that in such a case the indictment is bad.9

§ 207. Effect of omissions generally.—An indictment is not vitiated by the omission of a word where the meaning of the clause

- 1. See § 204 herein.
- 2. Parker v. State, 114 Ala. 690, 22 So. 791, wherein it is said: "Great precision should be preserved in matters which vitally affect the life and liberty of the citizen."
  - 3. Griffith v. State, 90 Ala. 583.
  - 4. Wood v. State, 50 Ala. 144.
  - 5. Anon. 2 Hayw. (N. C.) 140.
- 6. Evans v. State, 34 Tex. Cr. 110, 29 S. W. 266.
  - 7. Jones v. State, 25 Tex. App.
- 621, 8 S. W. 801, 8 Am. St. Rep. 449, wherein it was held that a motion to quash the indictment for such error should have been granted, it being declared that "appriate" and "appropriate" are not idem sonans.
  - 8. See § 204 herein.
- 9. State v. Caspary, 11 Rich. L. (S. C.) 356, holding that an indictment for bastardy was bad where it alleged that the accused was "the farther of the said bastard child."

in which the omission occurs is not thereby affected or where the entire clause could be struck out as surplusage without obscuring the meaning of the indictment.<sup>10</sup> So the omission of the pronoun "his" before the word "hands" in an indictment for murder alleging that the defendant with a certain gun which he in both hands then and there held, has been held to be no objection to the indictment.<sup>11</sup> And the omission of the word "of" in the description of the ownership of stolen property has been held to be a clerical omission which did not render the indictment fatally defective,<sup>12</sup> as has also the omission of this word "of" in other cases.<sup>13</sup> And the omission of the word "said" has been held

10. State v. Washington, 13 S. C. 453, so holding where the word "wound" was omitted between the words "mortal" and "of," causing the clause to read "one mortal, of the length of one-eighth of an inch, and of the depth of one inch, of which said mortal wound" the deceased See Commonwealth v. Butler, 1 Allen (Mass.), 4, holding the omission of the word "and" in the averment of a complaint charging the defendant with being a common seller of intoxicating liquors "on the first day of February in the year of Lord eighteen hundred and sixty,-from said last mentioned day to the day of making this complaint," was not a fatal defect. State v. Burns, 99 Mo. 471, 542, 12 S. W. 801, 13 S. W. 686, holding that an indictment was sufficient after verdict though the words "giving to the said deceased then and there" were omitted before the words "one mortal wound."

If what is omitted is implied in that which is expressed an indictment is good. People v. Bennett, 37 N. Y. 117, 4 Abb. Pr. N. S. 89.

11. Ward v. State, 8 Blackf. (Ind.)

101, wherein the court declared that "The omission or insertion of that pronoun would go merely to the certainty of the allegation, and not to accuracy in the description of any of the acts constituting the crime, and we think the allegation sufficiently certain in its absence." Per Perkins, J.

12. Abernathy v. State, 78 Ala. 411, so holding where the stolen property was described as "the property—A. B."

13. State v. Rhodes, 2 Ind. 321, holding the omission of the word " of " before the name William Hite in an indictment against the defendant in error for keeping a place where spirituous liquors were sold without license, in a disorderly manner, to the disturbance and common nuisance of William Hite, to be immaterial. Stanfield v. State, 43 Tex. Cr. 10, 62 S. W. 917, holding that an indictment was sufficient though the word "of" was omitted between the expressions "the tracks" and "the Fort Worth and Denver City Railroad Company" in the clause charging that the accused "did then and not fatal. <sup>14</sup> Again, in a case in New York it is decided that an indictment for murder is sufficient, although, by a clerical omission of the word "with," the offense in strictness of grammar, may appear to be charged against the knife, and not against the prisoner. <sup>15</sup> But where the word "with" was omitted between the name of the defendant and the clause "some heavy weapon," causing the indictment to read that the defendant "some heavy weapon or instrument \* \* \* did forcibly strike and beat," the omission was held to be fatal, as there was no allegation showing with what the homicidal act was done. <sup>16</sup>

§ 208. Effect of omissions—When fatal.—Where an essential word or clause is omitted from an indictment, such omission is fatal, as in such a case nothing can be taken or supplied by intendment.<sup>17</sup> And it has been said in this connection that the court cannot supply defects in pleading, by supposing to be inserted what it may be presumed the pleader intended.<sup>18</sup> And

there unlawfully and willfully place an obstruction, to wit, a large piece of timber, upon the track of a railroad there situated, to wit, the track the Fort Worth and Denver City Railroad Company."

14. State v. Burke, 108 N. C. 750, 12 S. E. 1000, holding that though a clause in an indictment for false pretenses in connection with the sale of a mule ought to have read "in truth and in fact said mule was not sound," the omission of the word "said" was not a ground for quashing an indictment.

15. Shay v. People, 22 N. Y. 317.

16. State v. Rector, 126 Mo. 328, 23 S. W. 1074. Compare State v. Mosely, 42 La. Ann. 975, 978, 8 So. 470, 471, holding it was no ground for quashing an indictment for wilful shooting with intent to murder under a statute which provided that "whosoever shall shoot, stab, or

thrust any person with a dangerous weapon with intent to commit murder shall," etc., that the words "with a dangerous weapon" were omitted.

17. Arkansas.—Cannon v. State, 60 Ark. 564, 31 S. W. 150.

Louisiana.—State v. Graham, 49 La. Ann. 1524, 22 So. 807.

**Mississippi.**—Cook v. State, 72 Miss. 517, 17 So. 228.

Missouri.—State v. Rector, 126 Mo. 328, 23 S. W. 1074; State v. Raymond, 54 Mo. App. 425.

**Texas.**—State v. Huston, 12 **Tex.** 245; Jones v. State, 21 **Tex.** App. 349, 17 S. W. 424.

Vermont.—State v. Leach, 27 Vt. 317.

Compare State v. Edwards, 19 Mo. 674, distinguishing between indictments for felonies and those for misdemeanors.

18. State v. Daugherty, 30 Tex. 360.

it has been declared in one case that where an indictment omits a material word, although it be but a preposition or a helping word, the court will not, from a knowledge of the language, supply the missing word so as to supply the probable intention of the grand jury, but will sustain a judgment quashing the indictment.<sup>19</sup>

§ 209. Same subject continued—Illustrations.—In the case of an indictment for playing at a game with cards upon which money was bet, at a certain public house, it was held that the omission of the word "at" before the words "a certain public house," was fatal, it being declared that the word "at" in that connection formed an integral part of the description of the offense.<sup>20</sup> And in an indictment for the theft of a horse, which should have alleged that it was taken from the possession of a certain person, the omission of the word "of" was held to be fatal.<sup>21</sup> Again, the omission of the word "did" before the words "kill and murder" has been held fatal,<sup>22</sup> as has also the omission

19. State v. Daugherty, 30 Tex. 360, cited and followed in Jones v. State, 21 Tex. App. 349, 17 S. W. 424, in which it was held that an indictment charging an assault with intent to murder was defective owing to the preposition "to" being omitted and left out entirely before the words "kill and murder."

20. State v. Huston, 12 Tex. 245. The court said: "A knowledge of the language of the statute enables us to perceive that the word 'at' was omitted, no doubt by accident, after the word 'bet.' We know that is the appropriate word to supply the omission. But were it not for our acquaintance with the subject, we might suppose the omission as well supplied by any other word which would make sense and render the sentence complete. It is evident that some word has been casually omitted.

But, if we were at liberty to supply such an omission by intendment, there is nothing in the indictment which indicates that the omitted word should be 'at' or 'in,' rather than 'by' or 'was,' or any other word or phrase which would render the sense grammatically accurate and complete. . . . It is clear that the word omitted is essential to the certainty necessary in the description of the offense. It cannot be supplied by intendment, and, of consequence, the omission must be fatal to the indictment." Per Wheeler, J.

21. Riley v. State, 27 Tex. App. 606, 11 S. W. 642.

22. Cook v. State, 72 Miss. 517, 17 So. 228. Judge Woods said: "We may by intendment read into the indictment the word 'did' so that the charge shall read 'did kill and murder' the deceased, and thereby make

of this word before the words "utter, publish, dispose and pass" in an indictment for passing counterfeit money.23 And likewise it has been decided that conviction for burglary cannot be sustained where the word "did" is omitted in the charging part.24 And in an indictment for subornation of perjury, the omission even by mistake, of the verb implying that the witness charged to have been suborned, testified, was held to be a fatal defect on a motion in arrest of judgment, which could not be supplied or cured by intendment.<sup>25</sup> In other cases, however, it has been held that the omission of the word "did" is merely a clerical error which does not vitiate an indictment.26 And in an indictment for misdemeanor the omission of the word did before the words "assault, beat and maltreat" has been held not to be fatal.27 In this latter decision the court distinguished between indictments for felonies and those for misdemeanors and declared that the strictness and rigor in the construction of indictments for

the defective paper an indictment for murder; or we may, guessing along the same line of offenses, read into the empty place in the indictment the words 'did attempt' to kill and murder the deceased; or we may interpolate the words 'did combine and conspire with John Doe and Richard Roe' to kill and murder the deceased, and surely, now, no one will justify the exercise of such power by this or any other court."

See, also, Edmondson v. State, 41 Tex. 496.

23. State v. Holder, 3 McC. L. (S. C.) 377.

24. Jester v. State, 26 Tex. App. 369, 9 S. W. 616.

25. State v. Leach, 27 Vt. 317. See, also, Menasco v. State (Tex.), 11 S. W. 898, holding that an indictment for perjury was fatally defective where the word "did" was omitted before the words "state and testify."

26. See Caesar v. State (Fla., 1905), 39 So. 470, decided under Rev. St. 1892, § 2893, and holding, in construing an indictment for the illegal sale of liquors that the omission of the word "did" before the word "engage" was plainly a clerical error, which was not a ground for reversing a judgment of conviction, where the meaning of the language was clear.

The omission in an information of the word "did" before the words "have" and "sell" is a defect in matter of form which does not tend to the prejudice of a substantial right of the defendant upon the merits and will therefore, under a code or statutory provision providing that such a defect does not vitiate an indictment or information, be regarded as immaterial. People v. Hoagen, 139 Cal. 115, 72 Pac. 836.

27. State v. Edwards, 19 Mo. 674.

felonies, are not applied uniformly to indictments for mere misdemeanors, and that in indictments for the latter, intendment is often resorted to.<sup>28</sup>

§ 210. Effect of erasures or alterations.—An indictment is not invalidated by the fact that an erasure has been made and new matter written therein,29 provided such erasures were apparently made and new matter inserted before the indictment was acted upon by the grand jury.30 So where the printed words "with intent" and "to" were erased in an indictment charging murder in the first degree, which was drawn upon what was apparently a blank form for assault with intent to murder, and the word "did" was inserted, the court declared that as it was not claimed that the erasures or interlineations were unauthorized or made after the indictment was presented by the grand jury and that as they appeared to have been made with similar ink to that used in filling in the blank spaces and in similar handwriting, it would be presumed that the alterations were made before the indictment was presented by the grand jury.31 And where a motion which was made to quash an indictment on the ground that it alleged an impossible date was based upon the fact that the word "two" had been obliterated and blotted out and the word "eight" written over it, it was held that the court did not err in overruling the motion.32 Again, where the name "Albert" was erased and that of "John" interlined in an indictment, it was held that this furnished no ground for a motion in arrest of judgment, it being declared that the accused was identified as the party who com-

<sup>28.</sup> State v. Edwards, 19 Mo. 674, 677. Per RYLAND, J.

<sup>29.</sup> Cook v. State, 119 Ga. 108, 46 S. E. 64, holding that where, in an indictment for murder, the given name of the person alleged to have been murdered is interlined in lieu of another name which is erased, and is in different ink and different handwriting from the rest of the indict-

ment, a demurrer upon the ground that, for this reason, the person alleged to have been murdered is not sufficiently identified is without merit.

<sup>30.</sup> Jones v. State, 99 Ga. 46.

<sup>31.</sup> Clemmons v. State, 43 Fla. 200, 30 So. 679.

<sup>32.</sup> Jacobs v. State, 42 Tex. Cr. 353, 59 S. W. 1111.

# §§ 211, 212 Body of Indictment Generally.

mitted the crime, and that whether he committed it in the name of Albert or John mattered nothing to justice.<sup>33</sup>

- § 211. Effect of interlineations.—Interlineations in an indictment, though said to be objectionable, are declared to furnish no ground for arresting judgment after a trial and verdict against a defendant,<sup>34</sup> where the interlineations were apparently made before the indictment was acted upon by the grand jury.<sup>35</sup> In this connection, however, it has been determined that if an indictment is conveniently legible, it will be presumed that interlineations therein were made before or at its execution in the absence of anything appearing upon the face of the indictment, or being shown extrinsically tending to prove that they were made subsequently.<sup>36</sup> In an early English case it is determined that if an indictment have an interlineation, and have a caret at the proper place where the interlined words are to come in, the court will take notice of the caret and read the indictment correctly.<sup>37</sup> And this doctrine is cited with approval in a recent case in Georgia.<sup>38</sup>
- § 212. Fatal defect in charging offense—Alteration or interlineation—Effect of plea or verdict.—Where the grade of the offense as stated in the indictment found by the grand jury is subsequently changed by alterations therein, though defendant pleads not guilty after being informed of the charge and
- .33. State v. Turner, 25 La. Ann. 573. In this case it appeared that the accused was arraigned as Albert Turner but was tried and condemned as John Turner. See Myatt v. State, 31 Tex. Cr. 523, 21 S. W. 456.
- 34. Commonwealth v. Desmarteau, 16 Gray (Mass.), 1. Judge Dewey said: "However they might have furnished a proper ground for a motion to the discretion of the court for quashing the indictment, had a motion to that effect been made before the party had pleaded, or perhaps

before he was put on his trial, they furnish no sufficient ground for arresting judgment after a trial and verdict against the prisoner."

- 35. Jones v. State, 99 Ga. 46.
- 36. French v. State, 12 Ind. 670.
- 37. Rex v. Davis, 7 Car. & P. 319, 3 Bing. N. C. 524. In this case the line read "One ewe sheep of the value of one pound," and a caret was inserted between the words "ewe" and "sheep" and the following words were interlined, "of the price of one pound, and one."

goes to trial he may on such trial prove the alterations which have been made, as the court has no jurisdiction to try him for any other offense than that which was charged by the grand jury in the indictment as filed by it.<sup>39</sup> And where an indictment found by a grand jury was fatally defective in failing to charge that the act was done feloniously and after the grand jury was discharged the word "feloniously" was inserted therein so as to properly charge the offense it was held that after the defendant had pleaded not guilty and a verdict had been rendered against him, he might then move the court to have the indictment restored to its original form, and that when so restored there might be an arrest of judgment, based on such fatal defect in the original indictment.<sup>40</sup>

39. People v. Granice, 50 Cal. 447, so holding where an indictment charging only manslaughter was changed to one for murder.
40. State v. Vest, 21 W. Va. 796.

#### CHAPTER IX.

## DESCRIPTION OF ACCUSED.

- SECTION 213. General rule as to stating name of accused.
  - 214. Necessity of repeating name.
  - 215. Use of initials instead of christian name.
  - 216. Same subject; may be controlled by statute.
  - 217. Name may be stated under an alias.
  - 218. Use of fictitious name; given name or surname unknown.
  - 219. Use of name by which defendant commonly or generally known.
  - 220. Indictment of foreigner under English equivalent of name.
  - 221. Middle name or initial; omission or insertion of.
  - 222. Abbreviations in stating name.
  - 223. Stating of name differently in different parts of indictment.
  - 224. Same subject; use of word "said."
  - 225. Where names are idem sonaus.
  - 226. Where two or more defendants are joined.
  - 227. Public corporations and officers.
  - 228. Corporations generally; member of partnership.
  - 229. Matters of description; English statute of additions.
  - 230. Same subject; use of words "junior" or "senior."
  - 231. Same subject; residence of defendant.
  - 232. Mode of raising objection on ground of misnomer.
  - 233. Waiver of misnomer.
  - 234. Same subject; as affected by statute.
  - 235. Amendment to cure misnomer.
  - 236. Same subject; statutory provisions as to.
- § 213. General rule as to stating name of accused.—It is a general rule that in an indictment both the christian name and the surname of the accused should be stated.¹ And a count charging
- 1. Burton v. State, 75 Ind. 477, wherein it is said: "The law presumes every man to have a christian name, unless the contrary appears, and, in an indictment or information against him, that name, as well as his surname, must be stated in full, unless some reason is shown for not

so stating it; and a failure to state it, or a reason for not stating it, may be taken advantage of on a motion to quash." Per WORDEN, J., citing Gardiner v. State, 4 Ind. 632; Moore's Crim. Law, p. 217, § 160.

See Campbell v. State, 10 Ind. 420; Donnel v. United States, 1 Morr. defendant with receiving stolen goods has been held defective where it did not contain the name of the defendant in the proper place and distinctly charge him with receiving the stolen goods.<sup>2</sup> It has, however, been decided that a person may be indicted and convicted though no name is given, where there is a description of his person, the color of his eyes and hair, his complexion, height and weight, where his name is unknown.<sup>3</sup>

§ 214. Necessity of repeating name.—It has been said that the name of the defendant committing the offense should be repeated to every distinct allegation, though it may be sufficient to mention it once in the nominative case in a continuing sentence.<sup>4</sup> And in an early case in Arkansas it is decided that if the surname of the

(Iowa) 141; State v. Florez, 5 La. Ann. 429; State v. Evans, 128 Mo. 406, 31 S. W. 34.

The christian name should be stated if known. Turner v. People, 40 Ill. App. 17; Commonwealth v. Perkins, 1 Pick. (Mass.) 388; and if not known that fact should be stated. Turner v. People, 40 Ill. App. 17.

Every person is presumed to have a christian name until the contrary is made to appear by proper averment. Gardner v. State, 4 Ind. 632.

Code provision dispensing necessity of averring christian name.---Under provision that "an error in the name of a defendant shall not vitiate an indictment, or proceedings thereon, and if his true name be discovered at any time before execution, an entry shall be made on the minutes of the court of his true name, referring to the fact of his having been indicted by the name mentioned in the indictment," it has been decided that a failure to set out the christian name will not vitiate an indictment. In this case it was said: "If the erroneous statement of the whole name of the defendant would not vitiate an indictment, certainly the omission to set out the christian name of a defendant would not, and the objection to the indictment on that account must be regarded as unavailing." Commonwealth v. Kelcher, 3 Metc. (Ky.) 484. Per Peters, J.

- 2. State v. Phelps, 65 N. C. 450.
- 3. Wiggins v. State, 80 Ga. 468, 5 S. E. 503.
- 4. State v. Hand, 6 Ark. 165, 168. Per Johnson, J. See State v. Coppenburg, 2 Strobh. (S. C.) 273, holding that the name need not be constantly repeated, but that when it occurs several times in the same count or sentence and is once mentioned in full, it may be subsequently abbreviated and reference thereto made by use of the word "said" or "aforesaid."

But see Commonwealth v. Hagarman, 10 Allen (Mass), 401.

defendant be omitted in the presenting portion of the indictment, the defect is fatal, though the full name be mentioned in subsequent allegations in connection with relative words, referring to the name, as their antecedent, as if fully given in the presentation. But in a recent case in Texas it is decided that while it would be the better practice to set out at the beginning of the indictment the name of the party accused, and then follow it with proper allegations defining and charging the offense against him, yet where it is made to appear that it was intended to charge defendant with the offense, and where the allegations point him out with due certainty as the party by whom it was committed, then it will not vitiate the indictment if the offense was not distinctly charged against such party in the beginning thereof. \$^6\$

§ 215. Use of initials instead of christian name.—A person may be indicted by the initial of his christian name in connection with his surname. So in a case where an objection to an indictment was raised on the ground that an initial was so used, the court declared "We are aware that in some of the States it has been held that an indictment setting forth by initials only the christian name of the accused is subject to a plea in abatement. We think, however, that these cases should not now be followed. They are based upon English cases of early date, and the reasons for them do not apply at the present time. In this State men are commonly known by the initials of their christian names as well as they are by those names in full. Such initials, followed by the surname in full, are held to constitute a sufficient description when used in deeds, wills, and other writings. Signatures and

6. Curtley v. State, 42 Tex. Cr. R. 227, 59 S. W. 44. See State v. Maldonado, 21 Wash. 653, 59 Pac. 489,

where a similar conclusion is reached in the case of an information. See Jordan v. State, 60 Ga. 656.

7. Wiggins v. State, 80 Ga. 468, 5 S. E. 503, holding that an indictment was sufficient where the name of the accused was given as "H. Wiggins." See Eaves v. State, 113 Ga. 749, 39 S. E. 318.

addresses in this form are in much more frequent use than those setting forth the full names. We cannot see why the same reason by which such a statement of a name is held good in a deed should not be applied in case of a criminal indictment. If, as matter of fact, the grand jury intended to indict some person other than the one arrested and put upon trial, this can be shown under a plea of not guilty."8 So it would seem that where a person is in the habit of using initials only for his first or christian name and he is known by those initials only, an indictment against him wherein his surname is given preceded by such initials, would be sufficient.9 And where the given name of an accused person is unknown it has been held proper to describe him by his surname and initials instead of his given name alleging that his "given name is to the grand jurors unknown." 10 And it has been decided that an indictment designating the accused by initial letters, as a baptismal name, is good after verdict.11 But where the defendant's christian name is set forth by initials only in an indictment it has been decided that it is subject to a plea in abatement unless it is alleged that the christian name was unknown to the grand jury otherwise than as laid in the indictment. 12 And where

- 8. Eaves v. State, 113 Ga. 749, 755, 39 S. E. 318. Per Simmons, J.
- 9. City Council v. King, 4 McC. L. (S. C.) 487, wherein it was so held after verdict where an indictment against A. W. King was objected to on the ground that the christian name of the accused was not given. The court said: "It surely will not be contended here, that a man may not take any name he pleases, and if he by his own conduct renders it doubtful what his real name is, the fault is his, and let the consequences be also his. truth I know no law, nor do I see any reason why a man may not take the letters A. W. for his first name, or as it is generally called, his christian name; for as there is no union

here between church and state, and no obligation on parents to baptize their children, this name may be as often changed as the patronymic, and although we know that letters are usually the initials of a name, yet if a person uses them and them only it is difficult to perceive how his real name can be known, for if he is sued as Alexander William, he may say they mean Andrew William, or any other name which may begin with those letters." Per Colcock, J.

- 10. Jones v. State, 11 Ind. 357.
- 11. Smith v. State, 8 Ohio, 294.
- 12. Gerrish v. State, 53 Ala. 476, wherein the court said: "However proper it may be, in the hurry of daily life, and on unimportant occasions, to write one's own name, or the

initials are used in place of the christian name of accused it has been decided that where there is a plea in abatement stating the true name of the accused and that his name is not the initials used and it appears from the evidence that he was never called by such initials, though they were in fact the initials of his name, it is error to instruct the jury that if they believed from the evidence that the defendant was known by the initials stated as much as by the name stated in the plea, the verdict must be for the State. <sup>13</sup>

§ 216. Same subject — May be controlled by statute.—In some States any objection which might have been available at common law because of the use of initials instead of the christian or baptismal name does not prevail by reason of statutory provisions. So under a statute providing that an error as to the name of defendant shall not vitiate the indictment, or proceedings thereon, and, if his true name be discovered at any time before execution, an entry shall be made on the minutes of the court of his true name, referring to the fact of his being indicted by the name mentioned in the indictment and the subsequent proceedings shall be in the true name. In indictment against several persons has been held good on demurrer where some of the parties

name of others, in the shortest intellegible manner, it is not allowable to do so in so grave and solemn an instrument as an indictment by a grand jury under oath, which denounces the person denominated in it as a violator of the law, with intent to have him sought out from the rest of the community and brought to punishment. And solicitors and grand juries ought to be diligent to find out and insert in their indictments the true names of those whom they thereby accuse." Per Manning, J.

See, also, United States v. Upham, 43 Fed. 68. Though it is alleged that the christian name is unknown, where initials are used, yet if it appears from the evidence that the true name of the defendant was known to the grand jury, it has been decided in Alabama that there can be no conviction. Winter v. State, 90 Ala. 637, 8 So. 556.

13. Hewlett v. State, 135 Ala. 59, 33 So. 662.

14. State v. Johnson, 93 Mo. 317, 6 S. W. 77, decided under R. S. 1879, § 1821.

15. Gantt's Ark. Dig., § 1785, p. 405.

were described by the initials of their christian names and the christian name of one of the parties was wholly omitted. 16

- § 217. Name may be stated under an alias.—Where there is a doubt as to the name of the defendant or his name is not known it may be properly averred in an indictment under an alias, 17 whether the name be the christian name 18 or the surname. 19 And where a person is indicted by his true name alias another name a plea that he is not now and never was known by the latter name is properly overruled, the alias being preceded by the true name. 20 So in a recent case in Texas it is decided, where a person was indicted by his true name "alias" another name, that the court did not err in refusing to have the expression "alias" followed by the name given stricken from the indictment. 21
- § 218. Use of fictitious name Given name or surname unknown.—A defendant may, in case his name is unknown, be described by a fictitious name, coupled with an averment that his true name is unknown. This rule applies where the given name of an accused person is not known, in which case he may properly be described in an indictment by his surname with an allegation that his given name is unknown.<sup>22</sup> But it is held that the author-
- State v. Webster, 30 Ark. 166.
   Haley v. State, 63 Ala. 89;
   Leslie v. State (Tex. Cr. App., 1898),
   S. W. 367. See State v. Howard,
   Mont. 518, 77 Pac. 50, in case of an information.

That the true name is stated as his alias, and that the defendant has no alias, is not a good plea in abatement. Noblin v. State, 100 Ala. 13, 14 So. 767.

The word "alias" is used in an indictment as the equivalent of alias dictus, or otherwise called, and indicates that the person referred to bears both names laid under the alias, but that he is called by one or the other of those names. Ferguson v. State, 134 Ala. 63, 32 So. 760, 92 Am. St. R. 17, citing Evans v. State 62 Ala. 6. See, also, Kennedy v. People, 39 N. Y. 245.

18. Haley v. State, 63 Ala. 89.

- 19. Viberg v. State, 138 Ala. 100, 35 So. 53, 100 Am. St. Rep. 22. See Noblin v. State, 100 Ala. 13, 14 So. 767.
- 20. Barnesciotta v. People, 10 Hun (N. Y.), 137, affirmed 69 N. Y. 612.
- 21. McCue v. State (Tex. Cr. App. 1907), 103 S. W. 883. It appeared in this case that the accused was as well known by the alias "Mud McCue," as he was by his true name, Frank McCue.
  - 22. Skinner v. State, 30 Ala. 524;

ity to employ this form of expression is only permitted when the name is unknown to the grand jury.<sup>23</sup> And it has been declared that it is only where the defendant's name cannot be discovered, that it is permitted to the State to describe him by a fictitious name, with the statement that his real name is unknown.24 And it is essential that in such a case the indictment should contain an allegation that the name of the defendant is unknown, and in some cases this is required by statute.25 It is also essential where the true name, both christian and surname, of the defendant is unknown that he should in some manner be so described that it can be ascertained what particular person the grand jury intended to indict. So where the defendant was described as "John Doe, a Chinese person, whose true name is to the grand jurors aforesaid unknown," it was declared that it clearly appeared that the name John Doe was used only as a fictitious designation, and that the grand jurors were unable to identify the person whom they were indicting, and it was held that with no other description of the defendant than this, it was not possible to say what particular Chinese person the grand jury intended to indict, and that for this reason the indictment was clearly insufficient.26

§ 219. Use of name by which defendant commonly or generally known.—It may be stated generally that any name by which a person is commonly called or known may be used in an indictment in place of the real name.<sup>27</sup> And it has been determined that an indictment is sufficient in which the accused is described by such a name.<sup>28</sup>

Levy v. State, 6 Ind. 281; Morgan v. State (Tex. Cr. App. 1903), 73 S. W. 968; Wilcox v. State, 35 Tex. Cr. 631, 34 S. W. 958.

23. Jones v. State, 63 Ala. 27; Geiger v. State, 5 Iowa, 484.

24. Geiger v. State, 5 Iowa, 484.

25. State v. Vandeveer, 21 Tex. 335, holding that under the fourth subdivision of article 335 of criminal jurisprudence, if the christian name of

a person is unknown, the indictment should state that his name is unknown and give some description of him and assign him a fictitious name.

26. United States v. Doe, 127 Fed. 982.

27. Eaves v. State, 113 Ga. 749, 39 S. E. 318.

28. Wilson v. State, 69 Ga. 224, holding it sufficient where the accused was described as "Doc" Wilson,

It is not, therefore, essential to the validity of an indictment that a defendant should in all cases be described by his surname provided a name is used as a surname by which he is equally well or better known.29 So where a person has several given names and he adopts one of them as the one by which he will be called and known it has been declared that such given name becomes part of his legal name and that he is properly described by that name in an indictment whether it stands first, or second, or third in the order of his given names. Having by such adoption become the distinctive given name of the defendant it is properly used to describe him in an indictment.<sup>30</sup> And where a defendant's second christian name had come to be regarded as his surname and he was so known it was held that it was not material that his real surname was different.<sup>31</sup> And a similar conclusion has been reached where a person is indicted by a christian name by which he is called and known though it may not in fact be his real christian name.32

though his real name was Harrison L. Wilson. State v. Brecht, 41 Minn. 50, 42 N. W. 602.

Sufficiency of proof of assumed name.-While it is true that a person may acquire by reputation a name which would as certainly identify him as his true name, and the assumed name or the one acquired by reputation, may be used in the indictment just as effectively to identify him as his true name, yet proof of the assumed name or the one acquired by reputation cannot be established by the statement made to a witness by a third person that his name was the one alleged in the indictment. Stallworth v. State (Ala. 1906), 41 So. 184.

29. Rufus v. State, 117 Ala. 131, 23 So. 144.

**30**. United States v. Winter, 28 Fed. Cas. No. 16743, 13 Blatchf. 276.

31. Rufus v. State, 117 Ala. 131, 23 So. 144, holding that where an in-

dictment designated the defendant as "John Rufus" and the defendant in a plea of misnomer alleged that his christian name was "John Rufus," and his surname "George," that he had never been known by the name of Rufus as a surname, a replication which alleged that long before and at the time of the finding of the indictment, the defendant was known as well by the name of "John Rufus" as by the name of "John Rufus George" was a sufficient response to the plea and was not demurrable.

32. Lewis v. State. 1 Head. (Tenn.) 329, holding that to a plea in abatement setting forth that the defendant was indicted by a wrong name, a replication, alleging that the defendant is called and known by the name mentioned in the presentment is good. See Commonwealth v. Gale, 11 Gray (Mass.), 320.

The omission of a defendant's christian name in an indictment

- § 220. Indictment of foreigner under English equivalent of name.—In the case of a foreigner who is resident in this country it is held that he may be indicted under a name which is the English equivalent of his name in his native tongue and to which he had assented.<sup>33</sup>
- § 221. Middle name or initial Omission or insertion of.— The law knows only one christian name and the middle letter forms no part of it so that its insertion or omission makes no difference and may be disregarded.<sup>34</sup> And it has been declared that if it be true that the middle name forms no part of the christian name an indictment cannot be sustained which sets out only the middle name and does not give the christian name at all.<sup>35</sup>
- § 222. Abbreviations in stating name.—Where surnames with a prefix to them are ordinarily written with an abbreviation, it has been decided that the names thus written in an indictment are sufficient.<sup>36</sup>

does not render an indictment demurrable where it is averred that the christian name is unknown to the grand jury. Skinner v. State, 30 Ala. 524; Jones v. State, 11 Ind. 354. But see State v. Vanderveer, 21 Tex. 335.

**33**. Alexander v. Commonwealth, 105 Pa. St. 1.

34. Alabama.—Rooks v. State, 83 Ala. 79. 3 So. 720; Edmundson v. State, 17 Ala. 179, 52 Am. Dec. 169, holding that the improper insertion of the middle letter L. in the name of the accused was immaterial. This case is cited and followed to same point in Pace and Cox v. State, 69 Ala. 231, 44 Am. Rep. 513, which held that if a middle name be averred it need not be proved.

**Arkansas.**—State v. Smith, 12 Ark. 622, 56 Am. Dec. 287. **Georgia.**—Veal v. State, 116 Ga. 589, 42 S. E. 705.

Iowa.—State v. Bowman, 78 Iowa. 519, 43 N. W. 302.

Missouri.—State v. Martin, 10 Mo. 391.

Ohio.—Price v. State, 19 Ohio, 423.

Tennessee.—State v. Hughes, 1 Swan, 261.

But see Commonwealth v. Perkins, 1 Pick. (Mass.) 388.

35. State v. Martin, 10 Mo. 391. But see People v. Kelly, 6 Cal. 210, decided under a statute directing in the case of one indicted under a wrong name, that where he gives the true name when arraigned, it should be so entered on the minutes and the prisoner tried under his true name.

36. State v. Kean, 10 N. H. 347. See State v. Granger (Mo. 1907), 102

§ 223. Stating of name differently in different parts of indictment.—Where a person is described in the charging part of an indictment by his correct name but in an additional averment, which may be rejected as surplusage, the name is not correctly stated, the indictment is not thereby vitiated.<sup>37</sup> And it has been decided that where in concluding an indictment there is an inconsistent or repugnant clause or averment such as a misnomer of the defendant, it should be treated as mere surplusage where the defendant is sufficiently and clearly charged with the commission of a crime by the other averments of the indictment.<sup>38</sup> And it is said in this connection that "if the name of a person be mistaken in an indictment, and the allegation in which the misnomer occurs be immaterial, so that it may be rejected as surplusage, it will not vitiate the indictment." 39 So where the name is stated correctly in the style of the indictment and in the charging part, an error in stating it in the formal commencement will not vitiate the indictment, such error being clearly a clerical misprision.<sup>40</sup> So where the name of the defendant is correctly stated at first a mistake in subsequently stating his christian name will not vitiate the indictment.41 And where in the caption of the indictment the defendant was named as James A. Smith and was

S. W. 498, holding that there was no merit in the contention that an information was defective on account of the abbreviation of the name of John by use of the letters "Jnc."

37. Drake v. State, 145 Ind. 210, 41 N. E. 799, wherein it was said: "If a name is immaterial, that is, if it is unnecessary to the statement of the offense, it may be rejected as surplusage and will not vitiate the indictment." Per Monks, J.

38. Kennedy v. State, 62 Ind. 136.

39. Mayo v. State, 7 Tex. App. 342. Per White, J., citing Commonwealth v. Hunt, 4 Pick. (Mass.) 252; United States v. Howard, 3 Sumn. 12.

40. Phillips v. State, 35 Ark. 384,

decided under the Criminal Code; Gautt's Dig., § 1785, p. 405, and distinguishing State v. Hand, 6 Ark. 165, 42 Am. Dec. 689.

41. Musquez v. State, 41 Tex. 226, holding, where, in an indictment for theft, the taking was charged to be by Amaranti Musquez and in alleging the intent he was described as the "said Aramanti Musquez," that the defendant, having been before correctly described, the word "Aramanti" might be rejected without affecting the indictment.

This case was followed and approved in Wampler v. State, 28 Tex. App. 352, 13 S. W. 144.

first referred to in the body of the indictment as James Smith, and subsequently his name was given as James A. Smith in the body of the indictment, it was held that the difference in the name created no uncertainty.<sup>42</sup>

§ 224. Same subject — Use of word "said."—It is not necessary to state the full name of the defendant more than once in the same count or sentence but it is sufficient where it has been once fully stated to repeat the surname in connection with the word "said" or "aforesaid." <sup>43</sup> And it has been declared that where the name has been properly set out, a subsequent reference to that name, using the word "said," although the name may be spelled differently in subsequent portions of the indictment, does not vitiate it. <sup>44</sup> So the words "the said Charles Robinson" in the latter part of an indictment have been held to necessarily refer to the Charles R. Robinson mentioned in the earlier part of the indictment. <sup>45</sup>

§ 225. Where names are idem sonans.—Where a plea of misnomer is raised it seems to be a general rule that if a demurrer to such plea raises the issue of *idem sonans* and the two names are pronounced substantially alike it will not generally be regarded as a misnomer which vitiates the indictment.<sup>46</sup> And in such a case

42. West v. State, 48 Ind. 483.

43. State v. Coppenburg, 2 Strobh. (S. C.) 273. See § 214 herein.

44. Bartley v. State (Tex. Cr. App. 1904), 83 S. W. 190. Per DAVIDSON, J. See, also, Eddison v. State (Tex. Cr. App. 1903), 73 S. W. 396, wherein it is declared that the name having once been properly set out, the subsequent reference to it by using the word "said" sufficiently designates the name as set out in the first instance.

45. Commonwealth v. Robinson, 165 Mass. 426, 43 N. E. 121, holding

that a motion to quash was rightly overruled.

46. Alabama.—Edmundson v. State, 17 Ala. 179, 52 Am. Dec. 169, so holding where the accused was indicted by the name of Edmindson and he pleaded in abatement that his true name was Edmundson.

Georgia.—Veal v. State, 116 Ga. 589, 42 S. E. 705, holding that Witt and Wid are clearly *idem sonans*. Biggers v. State, 109 Ga. 105, 34 S. E. 210, applying the doctrine of *idem sonans* where defendant was indicted by the name of "Biggers" and

the court may determine as a matter of law whether the names are idem sonans.47 But the question whether one name is idem sonans with another is said not to be a question of spelling, but of pronunciation, depending less upon rule than upon usage, which when it arises in evidence on the general issue, is for the jury and not for the court.<sup>48</sup> In this connection it is said in a case in Alabama "though this is strictly a question of pronunciation, when raised by demurrer it may be treated as a question of law; but, in such case, the judgment of the court should express the conclusion of law from the facts or rules of which judicial notice may be taken. When there is no generally received English pronunciation of the names as one and the same, and the difference in sound is not so slight as to be scarcely perceptible, the doctrine of idem sonans cannot be applied without the aid of extrinsic evidence, unless, when sound and power are given to the letters, as required by the principles of pronunciation, the names may have the same enuncia-

pleaded in abatement that his true name was "Bickers."

Kansas.—State v. Haist, 52 Kan. 35, 34 Pac. 453, holding the two names "Barbara" and "Barbara" are idem sonans.

Missouri.—State v. Hutson, 15 Mo. 512, holding that Hutson for Hudson is not a misnomer.

Texas.—Boren v. State, 32 Tex. Cr. 637, 25 S. W. 775, wherein the principle of *idem sonans* was applied in refusing to quash an indictment because "Israel" was written "Israel."

47. Munkers v. State, 87 Ala. 94, 6 So. 357; Veal v. State, 116 Ga. 589, 42 S. E. 705; Commonwealth v. Warren, 143 Mass. 568, 10 N. E. 178, wherein it was said that this class of cases is governed by the following rule: "If two names spelt differently, necessarily sound alike, the court may as matter of law, pronounce them to be idem sonans; but if they do not

necessarily sound alike, the question whether they are idem sonans is a question of fact for the jury." GARDNER, J., citing Queen v. Davis, 4 New Sess. Cas. 611, 5 Cox C. C. 237, 2 Den. C. C. 233, in which case the judge ruled as a matter of law that "Darius" and "Trius" are idem sonans. State v. Havely, 21 Mo. 498, holding that a court may say as a matter of law upon demurrer to a plea in abatement to an indictment, D. Havely " that "Owens "Owen D. Haverly" are idem sonans. State v. Blankenship, 21 Mo. 504, following the preceding case and holding that Blankenship and Blackenship are idem sonans as matter of law.

48. Commonwealth v. Donovan, 13 Allen (Mass.), 571, citing Commonwealth v. Mehan, 11 Gray (Mass.), 322, 323; Commonwealth v. Gill, 14 Gray (Mass.), 400.

tion or sound. . . . If by local usage the names have the same pronunciation, it becomes a question of fact which must be referred to the jury." <sup>49</sup> But though the defendant may have a right to submit to the jury, as a question of fact, whether the name proved is *idem sonans* with that laid in the idictment, he should claim the right on the trial and by omitting to do so he thereby waives all claim to insist on the objection on appeal.<sup>50</sup>

§ 226. Where two or more defendants are joined.—Where an indictment is returned against two or more persons it should appear with such certainty on the face of the indictment how many persons were intended that no mistake can occur. And though it may appear by other words of description that more than one person was evidently intended yet if the names are so written that the indictment does not show what the name of each person is, a plea in abatement will be held good.<sup>51</sup> Ordinarily the conjunction "and" should be used to show this fact, but though this conjunction is omitted it has been held sufficient where a comma is placed between the names.<sup>52</sup> And an indictment will be defective so far as more than one person is concerned where instead of the word "and" the word "alias" is used, apparently indicating that only one person is indicted. So where two names were mentioned in an indictment but instead of the conjunction "and" between the names the word "alias" was used it was decided, where two persons appeared and pleaded not guilty that the conviction of the one who answered to the name after the word "alias" could not be sustained.53

- 49. Munkers v. State, 87 Ala. 94, 96, 6 So. 357. Per CLAPTON, J. In this case the question was whether Munkers and Moncus were *idem sonans*.
- **50**. Commonwealth v. Gill, 14 Gray (Mass.), 400.
- 51. State v. Toney, 13 Tex. 74, so holding where the indictment was against Edward Toney, Joseph Scott, to which names were added the
- further words of description "laborers" and "possessors and occupiers of a house," etc.
- **52.** Hash v. Commonwealth, 88 Va. 172, 13 S. E. 398. See State v. Toney, 13 Tex. 74.
- 53. State v. Leonard, 7 Mo. App. 571, holding where an indictment was against James Ferguson alias Thomas Leonard alias Alison, and James Ferguson and Thomas Leonard were ar-

§ 227. Public corporations and officers.—In an indictment against a town it is not a good ground for a motion in arrest of judgment that the inhabitants are not described by their proper name.<sup>54</sup> And where pending an indictment against a town the name of the town was changed by the Legislature a refusal to quash the indictment for that cause was held proper.<sup>55</sup> where persons named in an indictment for maintaining a nuisance are described as the burgess and councilmen of a borough, naming the borough, it is decided that the persons so named are indicted in their corporate capacity, and not as individuals.<sup>56</sup> But in an indictment against a public officer it has been decided that it is essential that the office held by him should be specified.<sup>57</sup> And in the case of an information against a sheriff for misconduct and misdemeanor in office which contained no allegation as to what county he was sheriff of, it was held that the information was insufficient.58

§ 228. Corporations generally — Members of partnership.—In an early English case it is determined that a corporation may be indicted by its corporate name for breaches of duty imposed upon it by law, such as the failure to execute works pursuant to a statute but not for felony or crimes involving personal violence.<sup>59</sup>

raigned and each pleaded not guilty, upon which issue was joined and a severance granted to Thomas Leonard alias Alison from his co-defendant, that the conviction of Thomas Leonard could not be sustained.

54. Commonwealth v. Dedham, 16 Mass. 141, wherein it is declared that misnomer is only matter of abatement and is not a good cause for arrest even in criminal prosecutions.

**55.** Commonwealth v. Inhabitants of Phillipsburg, 10 Mass. 78.

**56.** Commonwealth v. Bredin, 165 Pa. St. 224, 30 Atl. 921.

57. United States v. Borneman, 36 Fed. 257.

As to necessity and sufficiency of description of public officers, see United States v. Watkins, 5 Cranch C. C. 441; United States v. Benner, Baldw. 234; Wright v. State, 18 Ga. 383; Binger v. People, 21 Ill. App. 367.

Indictments against school directors.—As to sufficiency of description in, see Commonwealth v. Brown, 23 Pa. Super. Ct. 470; Commonwealth v. Ferguson, 8 Pa. District R. 120.

58. State v. Daniels, 65 Kan. 861, 70 Pac. 635.

59. Queen v. Birmingham and Gloucester Railway Co., 43 Eng. Com. Law, 708, 3 Ad. & Ell. 223, 9 C. & In the case of an indictment against a corporation it is not necessary to state the time and place when and where the defendant became a corporation. So in an information against a railroad company it has been held sufficient to describe the company by its name and as "a corporation existing under and by virtue of the laws of this State, duly organized and doing business." Again an indictment which charges the commission of an offense by the defendants coupled with the further description that they are members of a private corporation is not subject to the objection that it is uncertain whether they are charged as individuals or as members of the corporation. In the case of a partnership it has been decided that the members cannot be indicted by their firm name but that the indictment should be against them as individuals.

P. 409. See Rex v. Mayor, etc., of Stratford-upon-Avon, 14 East. 348. But see Anonymous, 12 Mod. 559, the report of which is as follows: "Note: Per Holt, Chief Justice. A corporation is not indictable, but the particular members of it are."

60. State v. Vermont Central R. Co., 28 Vt. 583, wherein it was so held in the case of an information and the court said: "It was no more necessary that  $\mathbf{the}$ information should state the time and place, and when and where, the defendants became a corporation, than it would be to state the time and place of the birth of a natural person. A distinct and positive averment of the existence of an artificial person is usually all that is required." Per BENNETT, J.

61. State v. Vermont Central R. Co., 28 Vt. 583.

62. Barnett v. State, 54 Ala. 579, so holding where an indictment charged the defendants "being members or partners of a private company or corporation, known as the Talla-

hassee Manufacturing Company," with a certain offense. The court said: "The allegation that they were members or partners of a private corporation, or association, if it is not mere surplusage, serves only to point out the capacity in which they were acting in the commission of the offensethat they were engaged in transacting business as corporators, or as members of an association. That they were acting in that capacity does not relieve them from criminal liability, nor aggravate nor mitigate the offense. If the corporation or association would be indictable for the offense, the defendants are charged as the immediate and active agents in its commission, and are also indictable. The indictment directly and without ambiguity charges them individually with the offense. If it had charged the corporation or association, it would have been by its corporate name." Per Brickell, J.

Examine People v. Clark, 10 N. Y. Supp. 642, 10 Ry. & Corp. L. J. 28.

63. Peterson v. State, 32 Tex. 477.

§ 229. Matters of description — English statute of additions. —By an early English statute, known as the statute of additions, it was provided that in indictments there should be an addition to the name of the defendant of his estate, degree or mystery. 64 This statute which was recognized as a part of the common law in some jurisdictions in the United States has not been generally adopted in most of them, 65 and it is a general rule that words, terms or statements which are descriptive of the status of the defendant are

See Rawls v. State (Tex. Cr. App. 1905), 89 S. W. 1071.

64. The English statute, 1 Hen. V, ch. 5, provided "that in every writ of actions personal, appeals, and indictments, and in which the exigent shall be awarded in the names of the defendants in such writs original, appeals and indictments, additions shall be made of their estate, or mystery, and of the towns, or hamlets, or places, and counties, of which they were or be or in which they be or were conversant."

The object of this statute was to enable the person against whom the process ran, to be identified and thus prevent oppressions that had formerly resulted from want of certainty of description. Lanckton v. United States, 18 App. Cas. (D. C.) 348, 365, citing 2 Reeves Eng. Law, Finlason, 519; 4 Black, Com. 306.

Construction of words "estate or mystery" in statute.—In construing this statute it has been declared that estate and degree mean the same thing, the defendant's rank in life, and that mystery means the defendant's trade, art or occupation, such as merchant, mercer, tailor, painter, clerk, schoolmaster,

husbandman, laborer or the like. State v. Bishop, 15 Me. 122, citing 2 Hawk., c. 23, § 111.

65. In Maine this statute is said to have been adopted as a part of our common law. State v. Bishop, 15 Me, 122. And in New Hampshire it has been held that the statute of additions is a part of the common law of that state. State v. Moore, 14 N. H. 451, citing State v. Rollins, 8 N. H. 550. And in a case in Pennsylvania it is said to have been adopted and to be in force in that state. Commonwealth v. Murphy, 9 Lanc. L. Rev. 294. In Kentucky, by an early statute, the necessity of adding the degree or mystery of defendant was confined to indictments in which the exigent might be awarded or outlawry pronounced. Commonwealth v. Rucker, 14 B. Mon. (Ky.) 228, decided under act of 1896. And in Rhode Island, while this English statute was recognized in the early legislation of that state, it has been decided that in view of the course of subsequent legislation, any addition of the degree or mystery was unnecessary and could be safely omitted. The court, however, held that the addition of a false degree or mystery was a fatal error upon a plea in not material and therefore though there may be an error therein the indictment is not on that account vitiated. And especially will matter of description not be considered as vitiating the indictment where a statute prohibits the quashing of an indictment or arresting judgment for any omission or misstatement of title, occupation or description if such omission or misstatement do not tend to the prejudice of the defendant, and it is apparent that the term used does not in any manner prejudice the defendant. But where a statute creating an offense applies to persons of a certain class or status only and it is sought to indict a person under such statute it is essential to the validity of the indictment that there should be an averment of such facts as show that the accused was a person of the class or status designated. Where, however, a description is given it should not be one which is untrue and cal-

State v. Daly, 14 R. I. abatement. 510. In Indiana it has been decided that this statute is not applicable to prosecutions in that state. McDowell, 6 Blackf. (Ind.) 49. And in a case in the District of Columbia while it is said that the existence of this statute was recognized in Kentucky, Maine, New Hampshire, Pennsylvania and Virginia (citing the following cases: Report of Judges, 3 Binney (Pa.), 595, 614; Commonwealth v. Jackson, 2 Grant's Cas. 262; State v. Moore, 14 N. H. 451; State v. Bishop, 15 Me. 122; State v. Nelson, 29 Me. 329, 334; Commonwealth v. Sims, 2 Va. Cas. 374; Commonwealth v. Clark, 2 Va. Cas. 401; Commonwealth v. Rucker, 14 B. Mon. 228), it is held that it is not in force in the District of Columbia. Lanckton v. United States, 18 App. Cas. (D. C.) 348.

66. Commonwealth v. Scott, 10 Gratt. (Va.) 749, holding in the case of a presentment which described the defendant as a free negro, that, as for

the offense for which he was indicted was one for which persons, Indians, and free negroes could be prosecuted and punished in the same manner, a plea that the defendant was an Indian and not a free negro was an immaterial plea which was properly excluded. The court said: "The description of the defendant as a free negro does not enter into the nature of the offense or vary the mode of punishment." Per Allen, J.

See Frisbie v. United States, 157 U. S. 160, 39 L. Ed. 657, 15 Sup. Ct. 586; Jeffries v. State, 39 Ala. 655; State v. Guest, 100 N. C. 410, 6 S. E. 253.

67. State v. Nelson, 29 Me. 329, holding under a statute so providing that if an indictment against a feme covert describes her as "matron" the error, if it be one, is not a sufficient cause for quashing the indictment or arresting the judgment.

See Hammond v. State, 14 Md. 135. 68. United States v. McCormick, 1 Cranch C. C. 193. culated to cast approbium upon the defendant and to prejudice him in the minds of the jury. So where it was contended that the description was of such a character and the demurrer admitted the untruth of the description it was held that a plea in abatement was good.<sup>69</sup>

§ 230. Same subject — Use of words "junior" or "senior." — Where there are two persons of the same name who occupy the relation to each other of father and son it is not essential to the validity of an indictment against one of them that the defendant should in addition to his name be further described by the addition of the word "junior" or "senior." Such words are a mere matter of description. So it has been said that the word junior is no part of the name of a person. "It is a mere description of the person, and intended only to designate between different persons of the same name. It is a casual and temporary designation. It may exist one day and cease the next."

§ 231. Same subject — Residence of defendant.—It is not necessary as a general rule that the residence of the defendant should be stated in the indictment.<sup>73</sup> So the addition of the county of the defendant's residence is mere matter of form, and the failure to aver it does not affect the validity of an indictment.<sup>74</sup> And in England the addition of residence was considered unnecessary, except in cases where process of outlawry could issue and the necessity for it in any case rested upon their statute.<sup>75</sup>

69. State v. Bishop, 15 Me. 122, holding that in an indictment on the statute prohibiting the sale of lottery tickets a description of the accused as a lottery vender, when his proper description was a broker, was a good cause for abating the indictment. See State v. Daly, 14 R. I. 510.

70. Steinberger v. State, 35 Tex. Cr. 492, 34 S. W. 617, holding to this effect where this question was raised in respect to an information.

71. State v. Simpson (Ind. 1906),

76 N. E. 544; State v. Best, 108 N.C. 747, 12 S. E. 907.

72. People v. Collins, 7 Johns. (N. Y.) 549. See, also, People v. Oliveria, 127 Cal. 376, 59 Pac. 772; Commonwealth v. Perkins, 1 Pick. (Mass.) 388; State v. Best, 108 N. C. 747, 12 S. E. 907.

73. State v. Daniel, 49 La. Ann. 415, 22 So. 415.

74. Morgan v. State, 19 Ala. 556.

75. Morgan v. State, 19 Ala. 556.

§ 232. Mode of raising objection on ground of misnomer.— The proper method of making an objection on the ground of misnomer is by a plea in abatement or motion to quash.<sup>76</sup> A plea in abatement on this ground should state the full name of the defendant, it being declared that this is an essential requisite of such a plea.<sup>77</sup>

§ 233. Waiver of misnomer.—A misnomer in the statement of the defendant's name in an indictment may be waived by a plea of not guilty,<sup>78</sup> as it may also by a plea of guilty,<sup>79</sup> as by either

76. Harris v. People, 21 Colo. 95; Uterburgh v. State, 8 Blackf. (Ind.) 202; Turns v. Commonwealth, 6 Metc. (Mass.) 244, wherein it was said: "If, on his arraignment, he does not plead in abatement, he admits himself rightly designated by the names stated." Per Shaw, C. J. See People v. Kelly, 6 Cal. 210; State v. McGregor, 41 N. H. 407.

See Price v. State, 67 Ga. 723, holding that an objection that an indictment names the defendant, but afterwards in charging the offense leaves a blank instead of renaming him, should be taken advantage of by special demurrer, and that otherwise it is not a good ground for a new trial after verdict.

Waiver of plea.—A plea in abatement, because of the misnomer of the defendant, regularly precedes a demurrer, or a plea to the matter of the indictment; and is waived, if it is regularly pleaded, by the subsequent interposition of a demurrer, or other pleading, which, in effect, admits that the defendant is the person named or charged. Haley v. State, 63 Ala. 89. Per BRICKELL, J. See following section.

77. State v. Hughes, 1 Swan (Tenn.) 261.

A plea of misnomer should not only state what the true name of the accused is, but should further allege that he was not known and called by the name under which he was indicted. Wiggins v. State, 80 Ga. 468, 5 S. E. 503; Wilson v. State, 69 Ga. 224.

78. Alabama.—Verberg v. State, 137 Ala. 73, 34 So. 848, 97 Am. St. R. 17, wherein it was said: "His plea of not guilty was an admission that the name by which he was indicted was his true name and a waiver of the misnomer." Per Tyson, J. Wells v. State, 88 Ala. 239, 7 So. 272.

Arkansas.—State v. Webster, 30 Ark. 166, 170.

Missouri.—See State v. Johnson, 93 Mo. 317, 6 S. W. 77.

New Hampshire.—State v. Thompson, 20 N. H. 250, holding where the complaint was against a person by the name of Cahew, his name being Cahill, and he appeared and answered without objection to the name of Cahew, having been arrested by that name, it was too late to take the exception on the trial.

of these pleas he is regarded as having admitted the correctness of his name in the indictment. So it has been said in this connection: "If one be indicted by a wrong christian or surname, or addition, and he plead to that indictment not guilty, or answer to it by that name on his arraignment, he shall not be received afterward to plead misnomer or falsity of his addition, for he is concluded and estopped by his plea by that name; and of that estoppel the jailer and sheriff, that do execution, shall have advantage. Therefore, he that will take advantage of the misnomer of his christian name, surname, or addition, must do it by motion to quash, or plea abatement, on his arraignment; and the entry must be special."80 So where one is indicted by a name other than his true one, if he is sometimes called by it, answers to it when called, and makes an appearance in court demanding relief under it, an objection that he was indicted by a name other than his true name will not be sustained.81 In such a case it is decided that no advantage can be taken of the misnomer on the trial either by the introduction of evidence showing such misnomer or by a request for instructions to the jury or otherwise.82

§ 234. Same subject — As affected by statute.—By statute in some States it is expressly provided when the defendant may avail himself of the right to object to an indictment on the ground of misnomer. So under an early statute in Iowa it was provided that upon arraignment, the accused, if the name by which he is indicted is not his true name, must then declare what his true name is, or

New York.—People v. Smith, 1 Park. Cr. R. 329.

Pennsylvania.—Commonwealth v. Jackson, 1 Grant's Cas. (Pa.) 262, wherein it is said that "after a plea of not guilty and a trial on the merits, it is too late for the defendants to object, that their addition of degree, mystery, and residence are omitted or misstated." Per Lewis, C. J., citing 1 Ch. Cr. L. 202.

South Carolina.—State v. Thompson, Cheves L. (S. C.) 31.

**Texas.**—Neimann v. State (Tex. Cr. App. 1903), 74 S. W. 558.

79. State v. Johnson, 93 Mo. 317, 321, 6 S. W. 77.

80. State v. McGregor, 41 N. H. 407. Per FOWLER, J.

81. State v. Pierre, 39 La. Ann. 915, 3 So. 6.

82. Verberg v. State, 137 Ala. 73, 34 So. 848, 97 Ann. St. R. 17.

be proceeded against by the name in the indictment, and that if he give no other name or give his true name he is thereafter precluded from objecting to the indictment upon the ground of being therein improperly named.<sup>83</sup> And a similar statute has been in force in Texas.<sup>84</sup>

§ 235. Amendment to cure misnomer.—In case of a misnomer or error in the description of a person an amendment may be permitted for the purpose of correcting such misnomer or error. So it has been decided that when the court ascertains that the defendant has been indicted under a wrong name, it may at the trial of the cause, without a plea in abatement, order his correct name to be entered of record, and proceed with the cause. So where a woman charged with the murder of her husband was described as "the wife of" the deceased the judge at the trial ordered the description to be amended by striking out the word "wife" and inserting the word "widow." And where in an indictment

83. State v. White, 32 Iowa 17, construing Iowa Rev. St., §§ 4687, 4688, and holding that under this statute the objection that the defendant was wrongly named in the indictment could not be made for the first time after arraignment and trial.

84. Wilcox v. State, 31 Tex. 587, construing Paschal's Dig., Art. 2937, and holding that even in a capital case the defendant could not be heard, after arraignment, in denial of his true name having been set forth in the indictment.

85. People v. Kelly, 6 Cal. 210; Burroughs v. State, 17 Fla. 643; Louis v. Commonwealth, 16 Ky. Law Rep. 284; Shiflett v. Commonwealth, 90 Va. 386, 18 S. E. 838.

But see McGuire v. State, 35 Miss. 366, 72 Am. Dec. 124, wherein it is decided that the court has no power to amend an indictment, by correcting

a mistake in the christian name of the defendant, without the consent of the grand jury who found and returned the indictment into court. Commonwealth v. Buzzard, 5 Grat. (Va.) 694. In this case it appeared that by mistake a wrong name had been inserted in an indictment for misdemeanor, though the record of the court and the indorsement on the indictment showed the correct name, and it was held that the indictment could not be amended by striking out the wrong name and inserting the name of the person intended.

An information may be so amended.—State v. Cooper, 69 Kan. 382, 76 Pac. 845; State v. Pipes, 65 Kan. 543, 70 Pac. 363; State v. McLain, 43 Kan. 439, 23 Pac. 651; State v. Murphy, 55 Vt. 547.

86. Harris v. People, 21 Colo. 95.

87. Regina v. Orchard, 8 C. & P. 565.

there is a blank for the given name of the defendant it has been decided that it may be filled after the beginning of the trial especially when the defendant has been arraigned by his full name and the full name appears on the back of the indictment.<sup>88</sup>

§ 236. Same subject — Statutory provisions as to.—In some States an amendment for the purpose of curing a misnomer may be permissible under express provisions of the statutes or code.<sup>89</sup>

88. State v. Matthews, 111 La. 962, 36 So. 48.

89. Orr v. State, 81 Miss. 130, 32 So. 998, holding that under Miss. Cr. Code, 1892, § 1435, where the clerical misprision in this respect is perfectly manifest, the indictment may amended without the consent of the grand jury. Hubbard v. State, 62 N. J. L. 628, 43 Atl. 699, decided under Gen. Stat., p. 1128, which provided "that no indictment shall be abated by reason of any dilatory plea, or allegation of misnomer of the party offering such plea, but if the court shall be satisfied by affidavit or otherwise, of the truth of such plea or allegation, the court shall forthwith cause the indictment to be amended according to the truth." Colter v. State, 41 Tex. Cr. 78, 51 S. W. 945, decided under Tex. Code Cr. Proc., Art. 540, which provided that, "If the defendant, or his counsel for him, suggest that he bears some name different from that stated in the indictment, the same shall be noted upon the minutes of the court, the indictment corrected by inserting therein the name of the defendant as suggested by himself, the style of the cause changed so as to give his true name, and the cause proceed as if the true name had been first recited in the indictment." Under this statute an error in the name in the charging parts may be corrected as well as such an error in the formal parts. Sinclair v. State, 34 Tex. Cr. 453, 30 S. W. 1070, decided under Tex. Code Cr. Proc., Art. 513. Myatt v. State, 31 Tex. Cr. 523, 21 S. W. 256.

In Alabama it was provided by Code that an indictment could be amended "with the consent of the defendant, where the name of the defendant is incorrectly stated, or where person, property, or therein stated is incorrectly scribed." Code, 1886, § 4389. In construing this provision it was decided that an indictment can be amended by correcting a misnomer, only "with the consent of the defendant," and that this consent must be affirmatively shown by the record and will not be inferred from mere silence or failure to dissent. The court said: our opinion that the record should show affirmatively that the consent of defendant was given to the amendment. Mere silence, or failure to object, ought not to operate as a forfeiture of the defendant's right to be tried on the indictment in the form it has been framed by the grand jury.

And a statutory or code provision that where the accused is indicted under a wrong name, and he gives his true name when arraigned, it shall be so entered on the minutes and the prisoner tried under his true name is not in violation of a constitutional provision that no citizen shall be held to answer any criminal charge except upon a presentment by the grand jury. provision in the constitution is held not to require that the true name of an accused person shall be used. 90 So in an early case in California it is decided that the clause of the constitution which provides that no citizen shall be held to answer any criminal charge except upon a presentment by a grand jury, was intended to provide that the individual charged should be first indicted or presented by a grand jury and that the use of the name is only designed to identify the person. The court said: "Of what consequence is it, at the present day, whether the accused be charged by one name or another, except to identify his person, unless it be that he may not be put on his trial a second time by a different name, for the same offense, a consequence which is easily avoided by plea, or giving his true name on his arraignment. The constitution directs that the accused should be presented by indictment: not the accused by his true name, but the party or person himself."91

It would be an unsafe rule to infer consent from mere silence on the part of the defendant in such cases, and such a practice would not be in harmony with our past rulings on other questions of an analogous character." Shiff v. State, 86 Ala. 454, 4 So. 419. Per SOMERVILLE, J., citing Flanagan v. State, 19 Ala. 546; Spicer v. State, 69 Ala. 159; Sylvester v. State, 71 Ala. 17.

Statute applies to informations.—Such a statute or code provision has been held to apply to informations as well as to indictments, it being declared under the provision of the Texas Code of Criminal Procedure that the same course of procedure is to be pursued. Wilson v. State, 6 Tex. App. 154, citing 4 Tex. App. 41, and construing Code of Cr. Proc., Art. 469.

90. People v. Kelly, 6 Cal. 210, construing Const., Art. 1, § 8, and § 273 of Cal. Crim. Code. Lasure v. State, 19 Ohio St. 43. See State v. Schricker, 29 Mo. 265.

91. People v. Kelly, 6 Cal. 210. Per MUBRAY, J.

### CHARGING THE OFFENSE.

#### CHAPTER X.

## CHARGING THE OFFENSE — GENERAL RULES AND PRINCIPLES.

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  - 260. Disjunctive averments; surplusage.
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  - 262. Disjunctive averment not fatal; instances.
  - 263. Surplusage does not vitiate.
  - 264. Surplusage may be rejected.
  - 265. Same subject; application and illustration of rule.
  - 266. Same subject; application and illustration of rule continued.
  - Surplusage; power of court to reject matter as; what may not be rejected.
  - 268. Use of participial form.
  - 269. Use of videlicet.
  - 270. Averment that matters are unknown to grand jury.

- 271. Same subject; rule illustrated.
- 272. Matter of inducement.
- 273. Matters necessarily implied.
- 274. Legal conclusions.
- 275. Legal conclusions; application of rule.
- 276. Matter of which court will take judicial knowledge.
- 277. Matter of evidence.
- 278. Matter of defense.
- 279. Matter of defense; rule illustrated.
- 280. When question as to sufficiency of charge may be raised.
- 281. Same subject continued.
- 282. Same subject; defects caused by verdict.
- 283. Same subject; application of rule.
- 284. Same subject; effect of statutory provisions.
- 285. Bill of particulars; right to generally.
- 286. Matter of requiring bill of particulars is in discretion of court.
- 287. Bill of particulars not part of indictment; effect of granting motion for.
- § 237. Constitutional guaranty as to nature and cause of accusation.—By the constitution of the United States and also generally by the constitutions of the several States it is provided that the accused is entitled to demand the nature and cause of the accusation against him.<sup>1</sup> The object of this constitutional guaranty, which it is held cannot be waived,<sup>2</sup> is that the accused may
- 1. United States.—U. S. Const., Amend. 6.

Alabama.—Bill of Rights, §§ 10, 12; Noles v. State, 24 Ala. 672.

Kentucky.—Ky. Const., § 12, Art. 13; Conner v. Commonwealth, 13 Bush. 714.

Mississippi.—Miss. Const., § 10, Art. 1; Newcomb v. State, 37 Miss. 383.

Nebraska.—Neb. Const., § 11, Art. 1; Moline v. State, 67 Neb. 164, 93 N. W. 228.

North Carolina.—No. Car. Const., § 2, Art. 1; State v. Shade, 115 N. C. 757, 20 S. E. 537.

Oregon.-Bill of Rights, § 11;

State v. Doty, 5 Oreg. 491.

**South Dakota.**—S. D. Const., § 7, Art. 6; State v. Burchard, 4 S. D. 548, 57 N. W. 491.

Tennessee.—Tenn. Const., § 9, Art. 1; Sizemore v. State, 3 Head, 26.

Vermont.—Vt. Const., Art. 10; State v. Webber, 78 Vt. 463, 62 Atl. 1018.

2. Newcomb v. State, 37 Miss. 383, holding that a constitutional provision securing to an accused person the right "to demand the nature and cause of the accusation against him" cannot be waived or surrenered by him, and that if an indict-

be informed of the precise offense for which he must answer and thus be enabled to meet and defend against that particular accusation when called upon to do so.3 But it has been declared that this constitutional provision does not require that the accused shall have a right to a specific and detailed statement of the charge against him, the requirement being only that he shall be informed of the nature of the charge.4

§ 238. Legislature can not deprive accused of constitutional right.—A statute attempting to deny an accused person the right to demand the nature of the charge against him would be void as it is not in the power of the Legislature to deprive one accused of crime of the right to demand information of the nature of the crime which he is charged with having committed.<sup>5</sup> So where the constitution of a State contains a clause of this nature the Legislature has no power to provide by statute that a person indicted for an offense consisting of one state of facts may be tried and convicted under that indictment of an offense consisting of a different state of facts.<sup>6</sup> And a statute providing that in an indict-

tion of the offense as to notify the ... BELL, J., citing Brown v. People, 29 accused of the nature and cause of Mich. 232; People v. Marion, 28 the accusation against him" it is a nullity and may be objected to at any

As to waiver of right to indictment, see §§ 31-33 herein.

3. Moline v. State, 67 Neb. 164, 93 N. W. 228.

The rules of criminal pleading are framed on the supposition that accused persons may be innocent, and they cannot be construed except in that light. are assumed as necessarily containing, according to the constitutional requisition, enough to inform an innocent man of the facts intended to be shown against him. Chapman v.

ment does not contain such a descrip- People, 39 Mich. 357. Per CAMP-Mich. 255; People v. Olmstead, 30 Mich. 431.

> "It is a sacred right to the accused that he may know from the indictment of what he is charged and be prepared to meet the exact charge presented against him." State v. Morgan, 112 Mo. 202, 20 S. W. 546. Per Black, J.

- 4. Riggs v. State, 104 Ind. 261, 3 N. E. 886. See section following as to what must be stated.
- 5. Riggs v. State, 104 Ind. 261, 3 N. E. 886.
- 6. Conner v. Commonwealth, 13 Bush. (Ky.) 714.

ment thereunder it shall not be necessary to charge the particular felony which it was the object or purpose of the persons combining to commit is held to be unconstitutional, against natural right and void.7 But a statutory or code provision that in an indictment against an accessory "no other facts need be alleged in any indictment or information against such accessory" (an accessory before the fact) "than are required in an indictment or information against his principal" is not in violation of the provisions of the sixth amendment to the constitution of the United States, which provides, among other things, that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation against him.8 And in the case of an indictment for the offense of appearing in a public place a code provision which dispenses with any more particular designation of the place than "in a public place" is held not to be violative of the provision of the bill of rights securing to a defendant the right to be so informed.9 And it is also decided that such a provision of the constitution is not violated by a statute providing that in an indictment or information it shall be sufficient to describe money, bank bills or notes as money merely without specifying any particular coin, note, bill or currency.10

§ 239. Generic term felony should not be used.—The use of the generic term felony instead of naming the particular offense it is intended to charge is said to be inaccurate and objectionable, 11

- 7. Miller v. State, 79 Ind. 198, citing Scudder v. State, 62 Ind. 13; State v. McKinstry, 50 Ind. 465; Landringham v. State, 49 Ind. 186.
- 8. People v. Nolan, 144 Cal. 75, 77 Rac. 774, construing § 971 of Penal Code, as amended in 1880, which further provided that the distinction between an accessory before the fact and a principal and between principals in the first and second degree, in cases of felony is abrogated, and that all persons concerned in the commis-

sion of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed.

- 9. Walker v. State (Ala. 1907), 43 So. 188.
- 10. Randall v. State, 132 Ind. 539, 32 N. E. 305.
- 11. Johnson v. State, 36 Ark. 242; Lacefield v. State, 34 Ark. 275.

and in one case is spoken of as gross error. 12 But though such term is used and no name given yet if the particular offense intended to be charged is made distinct and certain by the statement of the facts and circumstances of its commission, an indictment will be held good.<sup>13</sup>

§ 240. Necessity of using technical words.—It is said by Blackstone that "in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offense, that no other words, however synonymous they may seem, are capable of doing it." 14 But words which are not of this character and the use of which is not essential to make the statement of the offense certain to a certain intent may be omitted and the indictment will be sufficient, where all that is necessary in charging the offense is stated.<sup>15</sup> And by

12. People v. Paige, 1 Ida. 102.

13. Johnson v. State, 36 Ark. 242; Lacefield v. State, 34 Ark. 275; People v. Beatty, 14 Cal. 566.

14, 4 Blacks. Com. 306, wherein he also further says by way of illustra-"Thus in treason the facts must be said to be done 'treasonably and against his allegiance;' anciently 'proditorie et coutra ligeantiae suae debitum; else the indictment is void. In indictments for murder, it is necessary to say that the party indicted 'murdered,' not 'killed' or 'slew' the other; which till the late statute was expressed in Latin by the word 'murdravit.' all indictments for felonies, the adverb 'feloniously,' 'felonice' must be used; and for burglaries also 'burglariter' or in English 'burglariously;' and all these to ascertain the intent. In rapes, the word "rapuit' or 'ravished' is necessary, " used in an indictment for assault

and must not be expressed by any periphrasis; in order to render the crime certain. So in larcenies also. the words 'felonice cepit et asportavit,' 'feloniously took and carried away,' are necessary to every indictment; for these only can express the very offense."

In an indictment for mayhem it was a rule at the common law that the indictment must not only charge the facts which constituted the injury, but must also charge, as a conclusion from the facts averred that the party was "maimed," such word being a term of art, set apart by the common law, for the description of the offense which no other word could supply. Guest v. State, 19 Ark. 405.

15. Lambertson v. People, 5 Park. Cr. R. (N. Y.) 201.

The word "forcibly" need not be

statute in some States the use of technical expressions, which were required at the common law are no longer essential.<sup>16</sup>

§ 241. Facts and circumstances should be stated — General rule.—It is a general rule that it is not sufficient to charge in an indictment that the defendant has committed a certain specified crime but that it must be stated how he committed the crime by reciting the material facts and circumstances constituting the offense. So in an early case in Alabama it is said: "The

with intent to commit rape. State v. Peak, 130 N. C. 711, 41 S. E. 887.

The words "with force and arms" have been superfluous since the statute 37, Henry VIII. State v. Harris, 106 N. C. 682, 11 S. E. 377; State v. Duncan, 6 Ired. L. (N. C.) 236; State v. Moses, 2 Dev. (N. C.) 452. See State v. Pratt, 54 Vt. 484.

16. Anderson v. State, 5 Ark. 444, holding that under the statutes in force in Arkansas the use of the word "murder" is not necessary to a charging of that crime. Caldwell v. State, 28 Tex. App. 566, 14 S. W. 122, holding same as preceding case.

17. United States.—Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. 542; United States v. Kelsey, 42 Fed. 882.

Alabama.—Martin v. State, 29 Ala. 30; State v. Seay, 3 Stew. 123.

**Arkansas.**—State v. Lewis, 53 Ark. 340, 13 S. W. 925.

California.—People v. Aro, 6 Cal. 207; People v. Hood, 6 Cal. 236.

Illinois.—Poore v. People, 26 Ill. App. 137.

Indiana.—Kinningham v. State, 119 Ind. 332, 21 N. E. 911; State v. Record, 56 Ind. 107; Markle v. State, 3 Ind. 535.

Iowa.—State v. Clark, 80 Iowa, 517, 45 N. W. 910; State v. Potter, 28 Iowa, 554.

**Kentucky.**—Jones v. Commonwealth, 3 Metc. 18.

Louisiana.—State v. Jackson, 43 La. Ann. 183, 8 So. 440.

Maine.—State v. Verrill, 54 Me. 408; Brown v. Williams, 31 Me. 401.

Massachusetts.—Commonwealth v. Hall, 15 Mass. 240.

Michigan.—Alderman v. People, 4 Mich. 414, 9 Am. Dec. 321.

Mississippi.—Denley v. State (Miss.), 12 So. 698.

Missouri.—State v. Van Nye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627; State v. Marshall, 121 Mo. 476, 26 S. W. 562; State v. Ragsdale, 59 Mo. App. 590; State v. Raymond, 54 Mo. App. 425; State v. Couch, 40 Mo. App. 325.

Nebraska.—Moline v. State, 67 Neb. 164, 93 N. W. 228.

New York.—People v. Albow, 140 N. Y. 130, 55 N. Y. St. R. 253, 35 N. E. 438; People v. Stark, 136 N. Y. 538, 32 N. E. 1046, 49 N. Y. St. R. 899; People v. Blanchard, 90 N. Y. learned author of Bacon's Abridgement remarks that 'every indictment ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency

314; People v. Haight, 54 Hun, 8, 26
N. Y. St. R. 33, 7 N. Y. Supp. 89;
People v. Gates, 13 Wend. 311; Dord v. People, 9 Barb. 671; Lambert v. People, 9 Cow. 578; People v. Stark, 12 N. Y. Supp. 688.

Ohio.—Bynam v. State, 17 Ohio St. 142; Dillingham v. State, 5 Ohio St. 280.

Oregon.—State v. Lawrence, 20 Or. 236, 25 Pac. 638.

South Dakota.—State v. Butcher, 1 S. D. 401, 47 N. W. 406.

Tennessee.—State v. Fields, Mart. & Y. 137.

Texas.—Click v. State, 3 Tex. 282; Weaver v. State, 34 Tex. Cr. 554, 31 S. W. 400; Maddox v. State, 28 Tex. App. 533, 13 S. W. 861; Brown v. State, 26 Tex. App. 540, 10 S. W. 112.

Vermont.—State v. Bacon, 7 Vt.

Virginia.—Parkinson v. State, 3 Gratt. 587.

England.—King v. Stevens, & East, 244.

It is an elementary rule of pleading that every material fact essential to the commission of a criminal offense must be distinctly alleged in the indictment. State v. Webb's River Improvement Co., 97 Me. 559, 55 Atl. 495. Per Peabody, J., citing Williams v. People, 101 Ill. 385; State v. Paul, 69 Me. 215; State v. Chapman, 68 Me. 477; State v. Bushey, 84 Me. 459, 24 Atl. 940.

"The indictment should allege all

the material facts necessary to be proved to secure a conviction." Brown v. Williams, 31 Me. 401. Per Shepley, J., citing People v. Gates, 13 Wend. (N. Y.) 311.

"The indictment should state specifically the facts and circumstances which constitute that offense." Click v. State, 3 Tex. 282. Per WHEELER, J.

That an offense is a felony or a misdemeanor need not be stated in express terms in an indictment. People v. War, 20 Cal. 117.

Where some of the counts are abandoned, the purpose of an indictment is nevertheless accomplished if the count or counts under which the trial proceeds set out the facts constituting the crime either directly or by reference to the preceding counts. People v. Lewis, 111 App. Div. (N. Y.) 555, 98 N. Y. Supp. 83.

Habeas corpus will lie where a person is imprisoned under an indictment where the facts alleged therein do not constitute a public offense. Ex parte Goldman (Cal. App. 1906), 88 Pac. 819, citing In Matter of Corryell, 22 Cal. 183; Ex parte Harrold, 47 Cal. 130; Ex parte Maier, 103 Cal. 479, 37 Pac. 402, 42 Am. St. Rep. 129; Ex parte Williams, 121 Cal. 331, 53 Pac. 706.

To convict one of aiding and abetting, the facts constituting the aiding and abetting should be sufficiently stated. Taylor v. Common-

or repugnancy.' And the author says 'it is laid down as a good general rule that in indictments as well as appeals, the special

wealth, 28 Ky. Law Rep. 819, 828, 90 S. W. 581, 584.

Indictment for assault with intent to commit rape.—In order to convict one of assault and battery under such an indictment it should appear from the allegation that some actual violence accompanied the attempt. State v. McAvoy, 73 Iowa, 557, 35 N. W. 630.

In an indictment for an attempt to commit a crime both the intent and the overt act should be alleged. State v. Wilson, 30 Conn. 500; Hogan v. State (Fla.), 39 So. 464.

In an indictment for bribery it should be alleged that the bribe was given and received corruptly. State v. Pritchard, 107 N. C. 921, 12 S. E. 50.

An indictment for embezzlement should aver the facts constituting the unlawful appropriation. Territory v. Heacock, 4 N. M. 354, 20 Pac. 171.

In an indictment for extortion the amount taken in excess of the lawful fee should be stated. Loftus v. State (N. J.), 19 Atl. 183, aff'd 52 N. J. L. 223, 20 Atl. 320. And there should also be an averment that the amount was extorted under color of office. State v. Pritchard, 107 N. C. 921, 12 S. E. 50.

Indictment for forgery.—There should be a statement of such facts in an indictment for forgery as show that the instrument alleged to be forged is one in respect to which forgery can be committed. State v.

Haran, 64 N. H. 548, 15 Atl. 20. And in the case of an indictment for uttering a forged instrument there should be a statement of the acts which constitute the uttering. Lockard v. Commonwealth, 85 Ky. 201, 8 S. W. 266; Purvis v. Commonwealth, 13 Ky. Law Rep. 744, 18 S. W. 357. Sufficiency of in particular cases see:

Alabama.—Williams v. State, 90 Ala. 649, 8 So. 629, forging a landlord's release of lien upon crops.

Georgia.—Hicken v. State, 96 Ga. 759, 22 S. E. 297, forgery of a check.

**Kentucky.**—Commonwealth v. Bowman, 16 Ky. Law Rep. 222, 27 S. W. 816, forgery of a note.

Massachusetts.—Commonwealthv. Dunleay, 157 Mass. 386, 32 N. E. 356, forgery of an application for an insurance policy.

Texas.—Carder v. State, 35 Tex. Cr. App. 105, 31 S. W. 678, forgery of an obligation to pay. Overly v. State, 34 Tex. Cr. App. 500, 31 S. W. 377, forgery of a railroad ticket. Simms v. State, 32 Tex. Cr. App. 277, 22 S. W. 876, forgery of an instrument certifying the sale of a note. King v. State, 27 Tex. App. 567, 11 S. W. 525.

Indictment for libel.—See People v. Stark, 136 N. Y. 538, 32 N. E. 1046, 49 N. Y. St. R. 899.

In an indictment for murder there should be an averment of the time and place of the death of the one murdered. Ball v. United States, 140 U. S. 118, 35 L. Ed. 377, 11 Sup. Ct. 761.

Indictment for obtaining

manner of the whole fact ought to be set forth with such certainty that it may judicially appear to the court that the indictors have not gone upon insufficient premises.' "18 And in an early case in Indiana it is declared that it is a general rule that whatever is essential to the gravamen of the indictment must be set out particularly. So in the case of an indictment charging a man with being "a common Sabbath breaker and prophaner of the Lord's day," it was held that the indictment was insufficient where it did not show how or in what manner he was a common Sabbath

property under false pretenses.

—In such an indictment there should be an averment that something was obtained by the false pretences. Jones v. United States, 5 Cranch C. C. 647. Where the indictment is at common law such false tokens should be set forth as the common law recognizes. United States v. Hale, 4 Cranch C. C. 83. See, also, as to sufficiency, Jenkins v. State, 97 Ala. 66, 12 So. 110; Scarlett v. State, 25 Fla. 717, 6 So. 767.

In an indictment for perjury it should be alleged that the matter in respect to which it is claimed the perjury was committed was material. State v. Cunningham, 116 Ind. 209, 18 N. E. 613; Commonwealth v. Wood, 2 Pa. Dist. R. 823, 13 Pa. Co. Ct. 477; Buller v. State, 33 Tex. Cr. 551, 28 S. W. 465. And it has been held that an averment that it was material is sufficient. State v. Jean, 42 La. Ann. 946, 8 So. 480; Sisk v. State, 28 Tex. App. 432, 13 S. W. 647. But see Territory v. Remuzon, 3 Gild. (N. M.) 648, 9 Pac. 598. As to the sufficiency of an indictment for perjury in particular cases see:

California.—People v. Bartman, 81 Cal. 200, 22 Pac. 592.

Kansas.—State v. Smith, 40 Kan. 631, 20 Pac. 529.

**Kentucky.**—Commonwealth v. Taylor, 16 Ky. Law Rep. 482, 29 S. W. 138; Ross v. Commonwealth, 14 Ky. Law Rep. 590, 20 S. W. 1043.

**Texas.**—Misener v. State, 34 Tex. Cr. 588, 31 S. W. 858.

Vermont.—State v. Clogston, 63 Vt. 215, 22 Atl. 697; State v. Smith, 63 Vt. 201, 22 Atl. 604; State v. Collins, 62 Vt. 195, 19 Atl. 368.

indictment for should set out the words as spoken and if they are uttered in a foreign tongue it is held they should be set out as uttered and not as translated into English. State v. Marlier, 46 Mo. App. 233. Compare Rogers v. State, 30 Tex. App. 462, 17 S. W. 548. Where a person was indicted for slander in stating that a certain woman "is pregnant and will give birth to a child in a few days" it was held to be insufficient in not excluding the fact of her being legitimately pregnant. Clark v. State, 32 Tex. Cr. 412, 24 S. W. 29.

18. State v. Seary, 3 Stew. (Ala.) 123, 131. Per COLLIER, J.

19. Markle v. State, 3 Ind. 535.

breaker and prophaner of the Lord's day.<sup>20</sup> When the act is not in itself necessarily unlawful, but becomes so by other facts connected with it the facts in which the illegality consists must be set forth and averred.<sup>21</sup> And in an early case in New Jersey it is said that where an offense consists in an omission to do some act the indictment must show how the defendant's obligation to perform that act arises, unless it is a duty annexed by law to the office which the defendant sustains.<sup>22</sup> And where one is charged with a common law offense, the mere averment that it was done contra pacem, does not dispense with the necessity of setting out in proper terms the circumstances necessary to constitute the alleged common law offense.<sup>23</sup>

- § 242. Object in requiring particularity.—In an early case in Georgia the objects in requiring particularity in setting out an offense are well stated as follows: First, in order to identify the charge, lest the grand jury should find a bill for one offense and the defendant be put on his trial in chief for another. Secondly, that the defendant's conviction or acquittal may inure to his subsequent protection should be again be questioned on the same grounds. Thirdly, in warranting the court in granting or refusing any particular right or indulgence incident under the law to the case. Fourthly, to enable the accused to determine on the line of his defense, and prepare for it both as to the law and facts; and, Fifthly, and finally, to put it in the power of the court to look
- 20. State v. Brown, 7 N. C. 224. The court declared in this case that an indictment is a compound of law and fact, and the court, upon an inspection of the indictment, must be able to perceive the alleged crime. Per Henderson, J.
- 21. Pearce v. State, 1 Sneed (Tenn.), 63, 60 Am. Dec. 135. See Cearfoss v. State, 42 Md. 403, wherein it is said that it is only in such cases that the facts in which the illegality consists must be set out.
- 22. State v. Hogeman, 13 N. J. 314; citing Stark. Cr. Pl. 180; Rex v. Holland, 5 Term. R. 623.
- 23. State v. Hodges, 55 Md. 127, wherein it was said: "It is a general rule that nothing material shall be taken by intendment or implication, but that in all cases the indictment must describe with certainty the offense of which the party is charged, and must aver the facts necessary to constitute such offense." Per ROBINSON, J.

through the record and to decide whether the facts charged are sufficient to support a conviction for a particular crime and to warrant the judgment; also to regulate the appropriate punishment for the particular offense.<sup>24</sup> And a like doctrine is asserted in other cases.<sup>25</sup>

24. Wingard v. State, 13 Ga. 396. Per Lumpkin, J.

25. In a recent case in the United States Circuit Court of Appeals it is said that an indictment "must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly that the court, upon an examination of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction." Miller v. United States, 133 Fed. 337, 341, 66 C. C. A. 399. Per SANBORN, J., citing United States v. Hess, 124 U. S. 483, 486, 487, 8 Sup. Ct. 571, 31 L. Ed. 516; United States v. Post, 113 Fed. 852.

In a case in Rhode Island it is said that, "The rules of criminal pleading require that the offense shall be charged specifically, first, in order that the accused may know precisely what he is to defend against, and secondly, that a record of his acquittal or conviction may be a bar to a subsequent prosecution for the same offense." State v. Pirlot, 19 R. I. 695, 36 Atl. 715, citing State v.

Doyle, 11 R. I. 574; State v. Smith, 17 R. I. 371, 22 Atl. 282.

In an early English case the rule is laid down that, "The charge must contain such a description of the crime, that the defendant may know what crime it is, which he is called upon to answer; that the jury may appear to be warranted in their conclusions of guilty or not guilty upon the premises delivered to them, and that the court may see such a definite crime, that they may apply the punishment, which the law prescribes." Rex v. Horne, Cowp. 672. Per Lord Chief Justice DE GREY.

The charge must contain such a description of the crime, that the respondents may know for what crime they are to answer, that the jury may appear to be warranted in their conclusion of guilty or not guilty, upon the premises delivered to them, and that the court may see such a definite crime that they may apply the punishment which the law prescribes. State v. Gary, 36 N. H. 359. Per FOWLEE, J., citing State v. Follett, 6 N. H. 53; Rex v. Horne, Cowp. 682.

"The indictment should leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, so that the defendant may not only know what he is called upon to meet, but also that a plea of former acquittal

§ 243. Facts need not be stated in minute detail.—The general rule as to stating in an indictment the facts and circumstances constituting the offense is not to be construed as requiring that all the facts should be stated in minute detail. It is sufficient where they are substantially stated in general terms.<sup>26</sup> Where an indictment is certain as to the person and the offense charged a more particular specification of the circumstances of the offense is not required where its only result would be to afford greater facilities in escaping a trial upon the merits by surrounding the case with additional technical requirements.<sup>27</sup> So it has been declared in New York that an indictment is sufficient which contains the substance of the offense, with the circumstances necessary to render it intelligible and inform the defendant of the allegations against  $m him.^{28}$ And it has been said that it is sufficient if the idea is clearly and distinctly expressed and that the pleader is not confined to any precise phraseology, except when technical words are necessary to give character to the offense.29 And if an indictment furnishes to the accused reasonable information of what he is called on to answer, by setting forth the constituent elements of the offense, it will be sufficient, although it omits many averments which at common law, were necessary to the validity of an indictment.30

§ 244. Minor circumstances need not be stated.—Minor circumstances which are not vital elements of the offense need not be set out in an indictment.<sup>31</sup> Facts and incidents which do not con-

or conviction can be shown with accuracy by the record." United States v. Baltimore & O. R. Co., 153 Fed. 997. Per Goff, J.

26. Kersh v. State, 24 Ga. 191; State v. Finley, 6 Kan. 366; State v. Ballard, 2 Murph. (N. C.) 186.

27. People v. Murphy, 39 Cal. 52.

28. Pontius v. People, 82 N. Y. 339. Per Danforth, J., affirming 21 Hun, 328.

29. State v. Wimberly, 3 McC. L.

(S. C.) 190.

30. Noles v. State, 24 Ala. 672; State v. Langford, 3 Hawks (N. C.), 381; United States v. Clark, 46 Fed. 633.

31. State v. New, 36 Ind. App. 521, 76 N. E. 181, citing State v. Allen, 12 Ind. App. 528, 40 N. E. 705; Fisher v. State, 2 Ind. App. 365, 28 N. E. 565; State v. Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504; Pemberton v. State, 85 Ind. 507.

stitute a necessary part of the offense, need not be stated for the purpose of distinguishing it, but they may be proved by the defendant, so as to fix its identity, and thereby protect himself from a second prosecution.<sup>32</sup>

§ 245. Should use direct and positive averments.—In charging the offense in an indictment it should not be done by way of recital, it being essential that direct and positive averments should be used.<sup>33</sup> "Every fact and circumstance stated in an indictment must be laid positively; it cannot be stated by way of recital, nor by way of argument or inference; the allegations must be in words,

See Quinlan v. People, 6 Park. Cr. (N. Y.) 9; State v. Switzer, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789.

32. Horan v. State, 24 Tex. 161, wherein the court said that the defendant "cannot require the State to do more than state, with reasonable certainty, the facts, and those only which constitute the offense." Per ROBERTS, J.

33. Indiana.—State v. Locke, 35 Ind. 419.

Maine.—State v. Paul, 69 Me. 215.
Minnesota.—State v. Nelson, 79
Minn. 388, 82 N. W. 650.

Mississippi.—Breeland v. State, 79 Miss. 527, 31 So. 104.

Nevada.—People v. Logan, 1 Nev. 111.

**New York.**—People v. Lewis, 111 App. Div. 558, 98 N. Y. Supp. 83.

South Carolina.—State v. Perry, 2 Bailey L. 17.

Texas.—Allen v. State, 13 Tex. App. 28; Hunt v. State, 9 Tex. App. 404; Parker v. State, 9 Tex. App. 351. See, also, sections following.

"The general rule is recog-

nized that material matters in either civil or criminal pleading must be directly alleged and not stated by way of recital." State v. Trueblood, 25 Ind. App. 437, 440, 57 N. E. 975. Per Comstock, J.

"As he verily believes."—In the case of an information it has been held that it is bad where the district attorney charges the offense "as he verily believes." The charge must be that the defendant committed the crime, not that he is guilty as the attorney verily believes. Vannatta v. State, 31 Ind. 210. See Ludden v. State, 31 Neb. 429, 48 N. W. 61. And an information which. instead of charging an offense in positive terms, merely charges that the county attorney "has reason to believe and does believe" that the acts constituting the offense have been committed by the accused has been held to be vulnerable to a demurrer. Sothman v. State, 66 Neb. 302, 92 N. W. 303.

That complainant "has probable cause to suspect."—A complaint and information on oath "that

clear, direct, and not argumentative or inferential."<sup>34</sup> So an indictment which alleges that the defendant is accused of having committed an offense, stating it, but which does not directly charge that the defendant committed the offense, is insufficient, as against an objection that the indictment does not charge a crime or state facts sufficient to constitute a public offense.<sup>35</sup>

§ 246. Supplying omissions by intendment or implication—General rule.—It is a general rule that the want of a direct, positive and material allegation, in the description of the substance, nature or manner of the offense cannot be supplied by any intendment, argument or implication.<sup>36</sup> So it has been said by the

the complainant has probable cause to suspect" that the accused has committed the offense charged has been held not to be a complaint made with such reasonable and sufficient certainty as to be the ground of a conviction and sentence. Commonwealth v. Phillips, 16 Pick. (Mass.) 211.

The use of the word "whereas" does not render a positive averment a mere recital. People v. Ennis, 137 Cal. 263, 70 Pac. 84. See People v. Fitzgerald, 92 Mich. 331.

**34.** Wabash, St. Louis & Pac. Ry. Co. v. People, 12 Ill. App. 448. Per Wall, J.

35. State v. Nelson, 79 Minn. 388, 82 N. W. 650, wherein the court said: "There must be a direct charge against the accused that he committed the offense. A recital that he is accused of having committed it is not a charge that he has committed it." Per Lewis, J.

36. United States.—Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419; 13 Sup. Ct. 542; United States v. Hess, 124 U. S. 483, 8 S. Ct.

571; United States v. Post, 113 Fed. 852.

Alabama.—State v. Seay, 3 Stew. 123.

**Arkansas.**—Gage v. State, 67 Ark. 309, 55 S. W. 165.

**District of Columbia.**—United States v. Barker, 19 Wash. L. R. 418.

Iowa.—State v. Gallangher, 123 Iowa, 378, 98 N. W. 906; State v. Clark, 80 Iowa, 517, 45 N. W. 910; State v. Potter, 28 Iowa, 554.

**Kentucky.**—Commonwealth Valters, 6 Dana, 290.

Maine.—State v. Paul, 69 Me. 215.Maryland.—State v. Hodges, 55 Md. 127.

Mississippi.—Riggs v. State, 26 Miss. 51.

Missouri.—State v. Rector, 126 Mo. 328, 23 S. W. 1074; State v. Fairlamb, 121 Mo. 137, 25 S. W. 895; State v. Gassard, 103 Mo. App. 143, 77 S. W. 473.

Nebraska.—Moline v. State, 67 Neb. 164, 93 N. W. 228; State v. Hughes, 38 Neb. 366, 56 N. W. 982; Smith v. State, 21 Neb. 552. United States Supreme Court that: "The general and, with few exceptions . . . the universal rule, on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital." 37 And in a case in New York in which this question is considered it is said: "A criminal charge may be and often is supported by inferences from facts which imply the existence of the principal fact constituting the offense. But the principal fact must be charged in the indictment. It is not sufficient to allege the facts from which an inference of the principal fact may be drawn, without charging the principal fact. The settled rule of criminal pleadings requires that all the elements which enter into the definition of an offense must be stated in the indictment. The strictness which formerly prevailed in respect to unessential matters in indictments, which often defeated the ends of justice, has been properly relaxed. But the rule that the offense must be charged in plain and intelligible language, and that the indictment must set forth all the essential elements of the crime, is and ought to be preserved alike for the protection of the accused and in the interest of the certain and orderly administration of the criminal law." 38 And a like doctrine is asserted in other cases.39

Nevada.—People v. Logan, 1 Nev. 111.

New York.—People v. Kane, 161 N. Y. 380, 55 N. E. 946; People v. Albow, 140 N. Y. 130, 35 N. E. 438.

South Carolina.—State v. Henderson, 1 Rich. L. 179; State v. Holder, 2 McL. 377.

Tennessee.—Kit v. State, 11 Humph. 167.

Texas.—State v. Powell, 28 Tex. 626; Juaraqui v. State, 28 Tex. 625.

**Vermont.**—State v. Webber, 78 Vt. 463, 62 Atl. 1018.

37. United States v. Hess, 124 U. S. 483, 486, 8 Sup. Ct. 571. Per Mr. Justice Field.

**38.** People v. Albow, 140 N. Y. 130, 134, 35 N. E. 438. Per Andrews, J.

39. "The well established principle of criminal pleading, which requires direct, positive and affirmative allegations of every point necessary to be proven, is too well established to require extended consideration. Noth-

§ 247. Same subject — Illustration.—In the application of this rule it has been decided that an indictment which alleged that the accused, acting as agents and representing the Fire and Marine Insurance Company of West Virginia, unlawfully did insure buildings and receive a sum named therefor, when said company had not complied with the laws of the State in filing a bond, was defective in failing to allege directly that the Fire and Marine Insurance Company of West Virginia was an insurance company. 40 in an early case in South Carolina an indictment, charging that the defendant "did take upon himself to retail spirituous liquors" without a license, was held bad upon a motion in arrest of judgment.41 The court said in this case: "The necessity of a positive and affirmative averment that the accused did the act charged, is obvious-without it, the obvious intendment grows out of the presumption in favor of innocence, nor can the court know of what offense the accused has been convicted, or the degree of guilt he has

ing in a criminal case can be charged by implication, intendment or recital, but every fact necessary to constitute the crime must be directly and affirmatively alleged." United States v. Post, 113 Fed. 852. Per LOCKE, J.

The indictment must allege everything which it is necessary to prove in order to convict the party accused. All the facts which enter into an offense must be set down by express averment, and the allegation must be full, nothing being left to intendment. The judge should not assume that anything is meant which is not in exact words plainly alleged. United States v. Burns, 54 Fed. 351. Per GOFF, J.

"The want of a direct allegation of anything material in the description of the substance, nature or manner of the offense, cannot be supplied by any intendment or implication whatever." People v. Logan, 1 Nev. 111. Per

LEWIS, J., quoting from Archbold's Cr. Pr. & Pl., § 87.

"As to the manner of making the averments, in all cases those which are descriptions of the crime must be introduced upon the record by averments, in opposition to arguments or inference. 2 Archb. Cr. Law, 40, 47; 1 Chitty's Cr. Law, 281, 288; Rex v. Horne, Comp. 682; Rush v. The Republic, 1 Tex. 160; Horan v. State, 24 Tex. 162; Alexander v. State, 29 Tex. 495. In a word, 'the facts constituting the offense must be averred directly, forcibly and with certainty, and not by way of inference and argument." Per White, J., in White v. State, 3 Tex. App. 605, quoted in Parker v. State, 9 Tex. App. 351; Hunt v. State, 9 Tex. App. 404.

**40**. Gage v. State, 67 Ark. 308, 55 S. W. 165.

**41**. State v. Perry, 2 Bailey L. (S. C.) 17.

incurred.<sup>42</sup> There is no affirmative allegation that the defendant did the act charged, nor is it supplied by the averment that he did take upon himself to do it. One may take upon himself to do an act in futuro, or one which he may be actually unable to perform. If the opposite intendment be adopted, the defendant has not yet done the act and may have been unable to do it." <sup>43</sup>

- § 248. Same subject Indictments for murder or manslaughter — Necessity of averments as to death.—In the case of an indictment for murder, the indictment will be defective where it does not allege that the one whom the defendant is accused of having murdered is dead.<sup>44</sup> And in an indictment for manslaughter it is necessary to state that death ensued in consequence of the act of the accused.<sup>45</sup> So an indictment for concealing the death of a bastard child should expressly and distinctly allege the child to be dead.<sup>46</sup>
- § 249. Same subject Offenses under a statute.—Under a code provision making the "use" of false weights an offense<sup>47</sup> an indictment charging that the defendants unlawfully and fraudulently "kept" false weights, and knowingly bought live stock weighed therewith, but containing no express averment that they "used" the weights has been held to charge no offense.<sup>48</sup> So an
- **42**. State v. Holder, 2 McC. L. (S. C.) 377.
  - 43. Per Johnson, J.
- 44. State v. Hagan, 164 Mo. 654, 65 S. W. 249. The court quotes from Hawkins, P. C., Book 2, ch. 25, § 60, as follows: "Also it seems to be generally agreed, that no indictment of death can be good without an express allegations that the deceased both received the hurt which is laid as the cause of his death, and also that he died of the hurt so received; and that the want thereof cannot be made good by any implication whatsoever."

See, also, United States v. Barber,

- 19 Wash. Law Rep. 418; State v. Keerl, 29 Mont. 508, 75 Pac. 362, 101 Am. St. Rep. 579, so holding in the case of an information.
- **45**. State v. Wimberly, 3 McC. L. (S. C.) 190.
- 46. State v. Ellis, 43 Ark. 93, holding, however, that it need not state whether it died before, at, or after its birth, nor in what manner, or by what acts the mother endeavored to conceal its birth.
  - 47. See Iowa Code, § 5044.
- 48. State v. Jamison, 110 Iowa, 337, 81 N. W. 594.

indictment under the provisions of the New York Penal Code in relation to advertising counterfeit money,<sup>49</sup> was held to be fatally defective where it contained no averment that the scheme was to sell or exchange, or to offer to exchange, "counterfeit" money, or what purported to be such, although there were facts stated in the indictment from which, if established, the jury would undoubtedly infer that it was a scheme to exchange real or pretended counterfeit money for good money.<sup>50</sup> Again, where a statute provides that a person holding public office in the State may be indicted for drunkenness, an indictment against an officer for drunkenness in office is insufficient where it does not allege that the accused held an office under the laws of the State.<sup>51</sup>

§ 250. Necessity as to certainty — General rule.—It is a general rule that in an indictment the nature of the offense and the party upon whom it was committed should be stated with such certainty that the accused may know what he is called upon to answer.<sup>52</sup> A person charged with a crime has a right to be in-

49. § 527.

People v. Albow, 140 N. Y. 130,
 N. E. 438.

51. Shanks v. State, 51 Miss. 464.

52. United States.—Peters v. United States, 94 Fed. 127, 36 C. C. A. 105; United States v. Wallace, 40 Fed. 144.

**Arkansas.**—Cain v. State, 58 Ark. 43, 22 S. W. 954; State v. Hand, 6 Ark. 165.

**District of Columbia.**—Ainsworth v. United States, 21 Wash. Law Rep. 806, 1 App. D. C. 518.

**Georgia.**—Johnson v. State, 90 Ga. 441, 16 S. E. 92.

Indiana.—State v. Cunningham, 116 Ind. 209, 18 N. E. 613.

Kentucky.—Commonwealth v. Perrigo, 3 Metc. 5; Goslin v. Commonwealth, 28 Ky. Law Rep. 683, 90 S.

W. 223; Sutton v. Commonwealth, 17Ky. Law Rep. 175, 30 S. W. 665.

Louisiana.—State v. Charles, 18 La. Ann. 720.

Maryland.—Harne v. State, 39 Md. 552; State v. Nutwell, 1 Gill. 54.

Massachusetts.—Commonwealth v. Meserve, 154 Mass. 64, 27 N. E. 997; Commonwealth v. Farnum, 127 Mass. 63

Mississippi.—Norris v. State, 33 Miss. 373.

Missouri.—State v. McGinnis, 126 Mo. 564, 29 S. W. 842; State v. Gassard, 103 Mo. App. 143, 77 S. W. 473; State v. James, 37 Mo. App. 214.

**Nebraska.**—Moline v. State, 67 Neb. 164, 93 N. W. 228.

New Hampshire.—State v. Messenger, 58 N. H. 348; State v. Gary, 36 N. H. 359.

formed, in plain, intelligible language free from reasonable doubt,

New York.—People v. Stocking, 50 Barb. 573, 32 How. Pr. 48; Dord v. People, 9 Barb. 671; Biggs v. People, 8 Barb. 547.

Oregon.—State v. Dougherty, 4 Oreg. 200.

Pennsylvania.—Hartmann v. Commonwealth, 5 Pa. St. 60; Sherban v. Commonwealth, 8 Watts, 212; Commonwealth v. Ramsey, 1 Brewst. 422.

South Carolina.—State v. Shirer, 20 S. C. 392.

South Dakota.—State v. Burchard, 4 S. D. 548, 57 N. W. 491.

Tennessee.—State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852.

Texas.—State v. Shwartz, 25 Tex. 764.

Vermont.—State v. Keach, 40 Vt.

Wisconsin.—Fink v. City of Milwaukee, 17 Wis. 26.

An indictment must be as certain as a declaration, for all rules in civil pleading apply to criminal accusations. State v. McCormack, 2 Ind. 305.

"Criminal charges must be preferred with reasonable certainty, so that the court and jury may know what they are to try, of what they are to acquit or convict the defendant, and so that the defendant may know what he is to answer, and that the record may show, as far as may be, of what he has been put in jeopardy. The averments should be so clear and distinct that there could be no difficulty in determining what evidence was admissible under them." Keller v. State, 51 Ind. 111, 115. Per Buskirk, J.

An indictment should set forth the special matter of the whole fact, with such certainty that the offense may judicially appear to the court; and it is not enough to charge a conclusion of law. State v. Graham, 38 Ark. 519. Per HARRISON, J., citing 1 Whar. Crim. Law, § 285.

It is a general rule that the special manner of the whole facts should be set forth in the indictment with such certainty that the offense may judicially appear to the court. State v. Wimberly, 3 McC. L. (S. C.) 190.

"The general rule is, that every indictment must charge the crime with such certainty and precision, that it may be understood; alleging all the requisites that constitute the offense, and that every averment must be so stated, that the party accused may know the general nature of the crime of which he is accused." Bulloch v. State, 10 Ga. 47. Per Warner, J., citing 1 Chitty's Crim. Law, marginal page 172.

"It is an elementary rule of criminal law that not only must all the facts and circumstances which constitute the offense be stated in an indictment, but they must be stated with such certainty and sion that the defendant may be enabled to judge whether they constitute an indictable offense or not, in order that he may demur or plead to the indictment accordingly, prepare his defense, and be able to plead the conviction or acquittal in bar of another prosecution for the same ofof the specific act which he is alleged to have committed.<sup>53</sup> "The facts and circumstances which constitute the offense charged, must be stated with precision and certainty. And every material circumstance, in regard to time and place, must be averred with that degree of certainty which is sufficient to exclude every other intendment." 54 So in a case in New York it is said that an indictment "must contain a certain description of the crime, and the facts necessary to constitute it. In general the rules of pleading which govern in the structure of a declaration are applicable to indictments. As to the degree of certainty which is required, the indictment must state the facts of the crime with as much certainty as the nature of the case will admit. In a criminal charge, in the language of Lord Mansfield, there is no latitude of intention to include anything more than is charged; the charge must be explicit enough to support itself." 55 And an indictment will be held insufficient where the words in which the commission of the crime is sought to be charged are uncertain and indefinite and subject to two meanings.56

§ 251. Highest degree of certainty not required.—It was early said by Lord Hale that "more offenders escape by the over easy ear given to exceptions in indictments than by their own innocence,

fense." Fink v. City of Milwaukee, 17 Wis. 26. Per Cole, J.

It is elemental knowledge that all essential matters must be alleged with such certainty that the defendant may be apprised of the precise nature of the charge against him, and this that he may be able to prepare to meet the charge by pleading or proof, and that the final judgment may protect him against future charges for the same offense. State v. Singer, 101 Me. 299, 64 Atl. 586.

In prosecutions for felony it is a cardinal principle that everything constituting the offense must be pleaded with certainty and nothing left to be implied. State v. Furgerson, 152 Mo. 92, 53 S. W. 427. Per BURGESS, J., citing State v. Evans, 128 Mo. 406, 31 S. W. 34.

In indictments for misdemeanors certainty is required. Evans v. United States, 153 U. S. 584, 608, 38 L. Ed. 830, 14 Sup. Ct. 934, 939.

53. People v. Williams, 35 Cal. 671.

54. Riggs v. State, 26 Miss. 51, 54. Per Smith, J., citing Arch. Crim. Plead., 34, 381; Chit. Crim. Law, 280, 283.

55. People v. Gates, 13 Wend. (N. Y.) 311, 317. Per SAVAGE, J.

**56.** State v. Charles, 18 La. Ann. 720.

and many heinous and crying offenses escape by these unseeming niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villiany and the dishonor of God." 57 The courts of to-day are inclined to be more liberal as to many matters than they were under the early common law, and to ignore mere technical objections which would in many cases operate to shield one who is guilty. In no case, however, will this policy of the law be carried to the extent of infringing upon the constitutional rights of an accused person. Certainty in charging the offense is required,58 but only such a reasonable certainty in stating the facts and circumstances of the offense as will fairly apprise the accused of the crime which is charged. essential that the facts and circumstances should be stated with the highest degree of certainty.<sup>59</sup> So it is said in a recent case in Vermont: "The highest degree of certainty is not required, but the charge must be set forth with such accuracy of circumstances as will apprise him with reasonable certainty of the nature of the same, that he may intelligently prepare to meet it, and if convicted. successfully plead his conviction in a subsequent prosecution therefor."60 And this doctrine is approved in a recent case in the United States Circuit Court of Appeals. 61

57. 2 Hale's P. C. 193, quoted by Lord Ellenborough in King v. Stevens, 5 East, 244, 260.

"The highest degree of certainty is not required; certainty to a common intent is sufficient. No rule should be applied which will only shield the guilty, instead of securing the ends of law. Where the indictment clearly charges a crime, and fairly advises the defendant of the particular act of which complaint is made, the principal object of such indictment is attained." Carper v. State, 27 Ohio St. 572. Per Johnson, J.

58. See § 250 herein.

59. United States.—United States v. Durland, 65 Fed. 408.

Iowa.—State v. Watrous, 13 Iowa, 489.

Kansas.—State v. Palmer, 40 Kan. 474, 20 Pac. 270.

**Kentucky.**—Commonwealth v. Magowan, 1 Metc. 368.

New Jersey.—Haase v. State, 53 N. J. L. 34, 20 Atl. 751.

South Carolina.—State v. Wimberly, 3 McL. (S. C.) 190.

**Texas.**—Smith v. State, 35 Tex. 738; Crook v. State, 27 Tex. App. 198, 11 S. W. 444.

**60**. State v. Webber, 78 Vt. **463**, 62 Atl. 1018. Per Powers, J.

61. Clement v. United States, 149

§ 252. Statutory provisions as to setting out facts and circumstances — Certainty.—It is provided by statute or Code in some States that an indictment should state the particular circumstances of the offense where they are necessary to constitute a complete offense. So in a case in Kentucky it is declared that "Under the present system of practice, as regulated by the Criminal Code, it is essential that an indictment contain a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and it must be direct and certain as regards the

Fed. 305, 313 (C. C. A.), wherein it "Learned counsel for deis said: fendant, in arguing the legal sufficiency of the present indictment, urges us to recognize and apply the criterion of the hornbooks of the law that certainty to a common intent is not sufficient, but that a high degree of certainty in every particular is required. This was anciently the fixed rule of criminal pleading, but of late years its rigidity has been somewhat relaxed. The well known canons of construction employed to ascertain the meaning of written instruments should not be ignored to secure mere technical accuracy, when that is unnecessary for the legitimate protection of the accused. Language should not be strained either to convict or to acquit; it should receive a reasonable and fair interpretation to accomplish, on the one hand, the indispensable purpose of fairly apprising the accused of the charge against him, so that he may intelligently prepare to meet it, and be enabled to make use of an acquittal or conviction to protect himself against another charge for the same offense; and, on the other hand, to enable the government, without unnecessary embarrassment, to effectually enforce its laws and bring the guilty to punishment. We must, so far as possible, consistently with insuring an accused person a fair and impartial trial, guaranteed to him by the Constitution and laws, disregard form, imperfection of statement, and unimportant defects, which do not reasonably tend to the prejudice of the accused. This we are commanded to do by positive law (section 1025, Rev. St. [U. S. Comp. St. 1901, p. 702]), as well as by repeated admonitions of the Supreme Court." Per Adams, J.

62. People v. Murphy, 39 Cal. 52; Goslin v. Commonwealth, 28 Ky. Law Turnpike Co. v. Commonwealth, 4 Ky. Rep. 683, 90 S. W. 223; Twelve Mile Law Rep. 369; Ky. Cr. Code, § 124.

In New York the Code provides that the indictment must contain: "1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties. 2. A plain and concise statement of the act constituting the crime, without unnecessary repetition." Cook's Code of Criminal Proc. (1906), § 275.

party and the offense charged, where they are necessary to constitute a complete offense." 63 Under a Code provision that "the indictment must be direct and certain as to the crime charged and the particular circumstances of the crime charged when they are necessary to constitute a complete crime" it has been declared that whenever it is practicable the indictment should contain such specification of acts and descriptive circumstances as will, upon its face fix and determine the identity of the offense, and enable the court, by an inspection of the record alone, to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law.64 A Code provision that there must be such a certainty in the description of the offense "as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense" does not prescribe a new rule and does not require so minute a description of the offense, as to entirely supersede proof of its identity, when the judgment is pleaded in bar to a second indictment. 65

§ 253. Statutes requiring less strictness in pleading.— In many of the States statutes have been passed modifying to a certain extent the strict rules of the common law as to the averments in indictments and providing what shall be sufficient in charging the offense. Where there are statutory or Code provisions prescribing the form and requisites of an indictment the sufficiency of an indictment is ordinarily to be determined by reference thereto. A Code provision that every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this

<sup>63.</sup> White v. Commonwealth, 9 Bush. (Ky.) 178.

<sup>64.</sup> State v. Dougherty, 4 Oreg. 200. Per Boreham, J.

<sup>65.</sup> Horan v. State, 24 Tex. 161.

<sup>66.</sup> State v. White, 129 Ind. 153, 28 N. E. 425; Ind. Rev. St. 1881, \$ Metc. 1756; State v. Chiles, 44 S. C. 338, 22 (Nev. S. E. 339; S. C. Act, 1887; State v. Lerein. See 4 Wash. 344, 50 Pac. 327, 746;

State v. Day, 4 Wash. 104, 29 Pac. 984; 2 Hill's (Wash.) Code, § 1244.

Power of Legislature to prescribe form and requisites of indictments, see §§ 45-47 herein.

<sup>67.</sup> Commonwealth v. Patterson, 2 Metc. (Ky.) 374; State v. Lovelace (Nev. 1906), 83 Pac. 330. See § 198 herein.

Code, or so plainly that the nature of the offense charged may be easily understood by the jury" means that an indictment conforming substantially to its requirements will be sufficient. It is not, however, intended to dispense with good pleading and is not designed to deny to one accused of crime the right to know enough of the particular facts constituting the alleged offense to be able to prepare for trial.<sup>68</sup> And where it is provided by statute that all that is necessary in an indictment or information is to allege the facts constituting the offense in ordinary and concise language with such certainty and in such manner as to enable a person of common understanding to know what is intended and the court to pronounce judgment according to law upon a conviction, it has been declared that it is unnecessary to include the word "felonious" or "feloniously" in charging a felony."69 And in a case decided under a statute requiring less particularity in criminal pleadings than formerly it was declared that this is right, that no guilty person ought to escape on account of a technicality and that if the Code is not broad enough to prevent this, the Legislature should never cease the work of reform, until this end is attained.70

§ 254. Where crime consists of series of acts.—An exception to the general rule requiring that all the essential facts and circumstances shall be set forth in an indictment exists in those cases where the crime consists of a series of acts. In such a case it is not necessary that the acts be specially described, for it is not each or all of the acts of themselves but the practice or habit which produces the principal evil and constitutes the crime.<sup>71</sup> "There are

**68.** Amorous v. State (Ga. App. 1907), 57 S. E. 999.

See §§ 46, 47 herein.

69. State v. Judd (Iowa, 1906), 109 N. W. 892, citing State v. Griffin, 79 Iowa, 568, 44 N. W. 813.

70. Wingard v. State, 13 Ga. 396.

71. Commonwealth v. Pray, 13 Pick. (Mass.) 359, so holding in the case of an indictment under the same

statute charging in the general words of the statute that the defendant "presumed to be and was a common seller of wine, etc., . . . not being first duly licensed." Compare People v. Murphy, 39 Cal. 52.

See cases cited in following section in support of and illustrative of principle stated in text.

Charging different offenses as a

many cases where a wrongful act is alleged in an indictment, and the evidence relied on to prove the criminal intention of the wrong-doer consists of a series of facts of a kindred nature, constituting but one offense. It is not necessary, in such cases, that each fact should be specifically set forth and described, for a general description, reasonably including the series, will be sufficient, as certainty to a common intent in general is all that is required in an indictment in such cases." 72

§ 255. Where crime consists of a series of acts continued.— In the case of an indictment for being a common scold it is not necessary that the particular facts showing that the accused is a common scold should be averred, it being sufficient to charge one with being a common scold in general terms.<sup>73</sup> And it has likewise been so held in charging one with being a "common barrator "74 or with the offense of night walking. 75 And in the case of an indictment under the statute for engaging in the "business of hawking and peddling" it was decided that it was unnecessary to allege the facts which constitute hawking and peddling.<sup>76</sup> court said in this case: "The term 'business,' therefore, as employed by the statute, being continuous in its character, not necessarily implying a single act or any number of acts, forms an exception to the general rule before stated, and falls within the principle applicable to barratry and some other offenses, that where the charge is of a complicated nature, consisting of a repetition of

combined act does not render an indictment defective where such offenses are, nevertheless, co-operative acts which may constitute altogether but one offense. Portwood v. Commonwealth, 4 Ky. Law Rep. 369.

72. United States v. Ford, 34 Fed. 26. The court then continued to say that "This class of cases includes such offenses as common barratry, common scolds, keeping a gaming house, a disorderly house, a house of

ill-fame, the carrying on the business of a retail liquor-dealer without paying the special tax, and other offenses of a like nature where continuous acts and duration of time enter into and constitute crime." Per Dick, J.

73. Baker v. State, 53 N. J. L. 45,20 Atl. 858.

74. Commonwealth v. Davis, 11 Pick (Mass.), 432.

75. State v. Dowers, 45 N. H. 543.76. Sterne v. State, 20 Ala. 43.

acts, or where the offense includes a continuation of acts, it is unnecessary to set them out in the indictment." 77

§ 256. Repugnancy generally.—Repugnancy in matters which are material to the statement or description of the offense constitutes a defect which vitiates the indictment.<sup>78</sup> And where an

77. Per GOLDTHWAITE, J., citing Hawkins' P. C. B'k. 2, ch. 25, § 59; Ch. C. L. 231.

Publishing scandalous newspapers.-Under a statute making it a felony to engage in the business of editing, publishing or disseminating a paper devoted to the publication of scandals and immoral conduct, an indictment was held sufficient which charged that the defendant was engaged "in the business of disseminating a certain newspaper and printed paper commonly called and known as The Kansas City Sunday Sun, which newspaper and printed paper was then and there devoted mainly to the publication of scandals, whorings, lechery, assignation, intrigues between men and women, and immoral conduct of persons," though it did not set out where the alleged newspaper was printed or purported to be printed; the date thereof; the edition of that date; to whom it was disseminated or sold; the names of the persons whose immoral conduct was published in said paper; the names of the men and women whose intrigues were set out; the identification of the scandals. whorings, lechery and assignations published. State v. Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627.

Intent-Violation of United

States statutes relating to distilled spirits.—An indictment under such statutes charging that the defendant did knowingly and unlawfully engage in and carry on the business of a distiller, within the intent and meaning of the internal revenue laws of the United States, with the intent to defraud the United States of the tax on the spirits distilled by him, against the peace, etc., is sufficient to authorize judgment The intent in such a case may "be manifested by so many acts upon the part of the accused, covering such a long period of time, as to render it difficult if not wholly impracticable, to aver, with any degree of certainty, all the essential facts from which it may fairly be inferred." United States v. Simmons, 96 U. S. 360. Per Mr. Justice HARLAN.

78. United States.—United States v. Grimm, 45 Fed. 558.

Alabama.—State v. Mahan, 2 Ala. 340.

Arkansas.—State v. Hand, 6 Ark. 165.

**Florida.**—Butler v. State, 25 Fla. 347, 6 So. 67.

Massachusetts.—Commonwealthv. Lawless, 101 Mass. 32.

Missouri.—State v. Hayes, 24 Mo. 358; Jane v. State, 3 Mo. 61; State v. Harwick, 2 Mo. 226.

offense is charged in the terms of the statute, which is generally sufficient, if superfluous allegations are added, and these show a case not within the statute the several allegations become repugnant and the indictment is bad on demurrer. But where it is provided by statute that criminal proceedings shall not be effected by any defect or imperfection in matter of form only which does not tend to the prejudice of the accused, a defect consisting of repugnant averments in an indictment should be taken advantage of by a demurrer or motion to quash or by exceptions to the charge and where an objection is not so taken it is decided that the defect will be cured by a general verdict of guilty. So

§ 257. Repugnancy — Application of rule.—An indictment is fatally defective where it charges that the defendant did "willfully" and with "culpable negligence" kill another.<sup>81</sup> And an indictment which charges that one did "assist and abet" in the

New Hampshire.—State v. Horan, 64 N. H. 548, 15 Atl. 20.

New York.—People v. Kane, 43 App. Div. 472, 61 N. Y. Supp. 195, 14 N. Y. Cr. R. 305, aff'd 161 N. Y. 380, 55 N. E. 946; People v. Wise, 3 N. Y. Cr. R. 303.

North Carolina.—State v. Hendricks, Cam. & N. 369.

**Texas.**—State v. Chinn, 29 Tex. 497; Hickman v. State, 44 Tex. Cr. 533, 72 S. W. 587.

Vermont.—State v. Haven, 59 Vt. 399, 9 Atl. 841; State v. Temple, 38 Vt. 37.

Wyoming.—McCann v. United States, 2 Wyo. 267.

Repugnancy in stating facts as to time or place is fatal. State v. Hayes, 24 Mo. 358; Jane v. State, 3 Mo. 61; State v. Harwick, 2 Mo. 226; State v. Hendricks, Cam. & N. (N. C.) 369; State v. Chinn, 29 Tex. 497; State v. Temple, 38 Vt. 37.

Words "store" and "shop" not synonymous.-Where an indictment alleged that the prisoner "broke and entered the store of one Merrill" and certain goods "in the shop aforesaid then and there being, then and there in the shop aforesaid, feloniously did steal, take and carry away," it was held that the words "store" and " shop " were synonymous and that the "shop," being descriptive of the place where the larceny was committed, could not be rejected as surplusage. Upon a demurrer a judgment was given for the defendant. Canney, 19 N. H. 135.

79. State v. Mahan, 2 Ala. 340, citing King v. Stephens, 5 East, 244.

80. Lehman v. United States, 127 Fed. 41, decided under Rev. St., § 1025 (U. S. Comp. St. 1901, p. 720).

81. State v. Lockwood, 119 Mo. 463, 24 S. W. 1015.

killing and murdering and also that he was "accessory before the fact to the killing and murdering" is fatally defective, as the charge that one did "assist and abet" is wholly inconsistent with that of being accessory before the fact.82 But in a case in Missouri it has been decided that an objection that an indictment is contradictory in first alleging that one of two defendants shot and killed the deceased and that the other advised and incited him to do the act, and then concluding by alleging that both killed and murdered the deceased, is without merit under a Code provision that all distinctions between principals and accessories before the fact have been abolished and which permits of the indictment of one as accessory and his conviction as principal.<sup>83</sup> And it has been held that an objection to an indictment that it charges an absurdity in alleging that the revolver was loaded with one leaden bullet with which two mortal wounds were inflicted is without merit.84 Again it has been held that there is no repugnancy between the act of removing and that of destroying the inclosure around a graveyard, as the former in fact may be considered as including the latter since the act of removal would destroy the fence so far as it was useful in protecting the burial ground from the incursion of trespassers.85

§ 258. Repugnancy — Rejection of averment as surplusage.— Contradictory and repugnant allegations which contain no matter which, if true, would constitute a legal bar to the prosecution are not a ground for quashing an indictment or information where the offense is charged with sufficient certainty and may be rejected as surplusage. So where an indictment charges a person with an offense that is indictable at common law but which is not punishable by any statute of the State, concluding words of the indict-

<sup>82.</sup> State v. Sales, 30 La. Ann. 916.

<sup>83.</sup> State v. Stacy, 103 Mo. 11, 15 S. W. 147.

<sup>84.</sup> State v. Taylor, 126 Mo. 531, 29 S. W. 598.

<sup>85.</sup> Phillips v. State, 29 Tex. 226.

<sup>86.</sup> Watson v. State, 111 Ind. 599, 12 N. E. 1008; Trout v. State, 111 Ind. 499, 12 N. E. 1005; Commonwealth v. Pray, 13 Pick. (Mass.) 359; State v. Furgerson, 162 Mo. 668, 63 S. W. 101.

ment "contrary to the form of the statute" may be rejected as surplusage.<sup>87</sup> But an objection to a count for repugnancy in the description of the offense cannot be removed by striking out as surplusage the allegation which is inconsistent with a previous one, unless, after striking out the subsequent allegation, a legal description of the offense will remain.<sup>88</sup>

§ 259. Indictment must not charge disjunctively.—It is said to be elementary that an indictment, information or complaint must not charge the accused disjunctively, so as to leave it uncertain what is relied on as the accusation against him. And this is the general rule except in those cases where it has been modified by statute. In this connection, however, it is said in a case in North Carolina that the better rule seems to be now that "or" is only fatal when the use of it renders the statement of the offense uncertain and not where it is manifest that the defendant cannot be embarrassed by uncertainty in preparing his defense by reason of the use of the disjunctive. When the word "or" is used in a statute in the sense of "to wit" it is decided that the offense may be charged in the words of the statute.

87. Commonwealth v. Reynolds, 14 Gray (Mass.), 87, 74 Am. Dec. 665.

88. Dias v. State, 7 Blackf. (Ind.) 20, 39 Am. Dec. 448.

89. Alabama.—Hornsby v. State, 94 Ala. 55, 10 So. 522; Allred v. State, 89 Ala. 112, 8 So. 56; Mays v. State, 89 Ala. 37, 8 So. 28; Horton v. State, 53 Ala. 488.

California.—People v. Hood, 6 Cal. 236.

**Georgia.**—Henderson v. State, 113 Ga. 1148, 39 S. E. 446; Grantham v. State, 89 Ga. 121, 14 S. E. 892.

Maine.—State v. Singer (Me. 1906), 64 Atl. 586.

Massachusetts.—Commonwealth v. Gray, 2 Gray, 501, 61 Am. Rep. 476.

**New York.**—People v. Schatz, 50 App. Div. 544, 64 N. Y. Supp. 127.

Rhode Island.—State v. Carver, 12 R. I. 285.

South Carolina.—State v. O'Bannon, 1 Bailey, 144.

Texas.—Potter v. State, 39 Tex. 388.

Vermont.—State v. Dyer, 67 Vt. 690, 32 Atl. 814.

Wisconsin.—Clifford v. State, 29 Wis. 327.

90. Horton v. State, 53 Ala. 488. See cases in preceding note.

In Alabama under the Code 1896, §§ 4906, 4911, alternative allegations may be used in an indictment. Smith v. State, 142 Ala. 4, 39 So. 329.

91. State v. Van Doran, 109 N. C. 864, 14 S. E. 32. Per AVERY, J.

92. Clifford v. State, 29 Wis. 327.

"or" between words which are synonymous does not render an indictment bad as being in the alternative. 93 And it has also been decided that the use of the word "or" is a proper connective in pleading negative averments. 94 Such a defect where it is fatal may be taken advantage of by a motion in arrest of judgment. 95

§ 260. Disjunctive averments — Surplusage.—An indictment will not be vitiated by the insertion after the disjunctive of an allegation which is superfluous and may be rejected as surplusage. So where an indictment under an act concerning malicious and unlawful shooting charged the defendant with shooting "with a certain pistol or revolver" it was held that the expression "or revolver" was surplusage and could be rejected. 97

§ 261. Disjunctive averment fatal — Instances.—An indictment charging the respondents with having conspired among themselves falsely and maliciously to charge or cause to be charged, and with having falsely and maliciously prosecuted or caused to be prosecuted, a certain person for a certain crime, is bad for uncertainty. And an indictment for arson, charging that the accused did on a certain day burn, or cause to be burned, a certain dwelling house has been held bad because of the charge being laid in the disjunctive. So it has been decided that a complaint or in-

As to use of disjunctive "or" in statute, see, also, Wilson v. State, 156 Ind. 417, 59 N. E. 380; Ferris v. State, 156 Ind. 224, 59 N. E. 475; State v. Bauer, 1 Ohio Dec. 199, 1 Ohio N. P. 103.

93. Cobb v. State, 45 Ga. 11, so holding where an indictment charged the defendant with permitting a minor to "play or roll" billiards on a table kept by him. See Barth v. State, 18 Conn. 431.

94. State v. Carver, 12 R. I. 285.

95. Whiteside v. State, 4 Colds (Tenn.), 175.

96. Henderson v. State, 113 Ga. 1148, 39 S. E. 446; People v. Gilkinson, 4 Park. Cr. R. (N. Y.) 26, wherein it was said that to suffer the insertion of such an allegation to defeat the ends of justice would be pushing nicety in pleading to an extreme.

97. State v. Newsom, 13 W. Va.859. Compare Henderson v. State, 113Ga. 1148, 39 S. E. 446.

98. State v. Gary, 36 N. H. 359, holding that a judgment on such an indictment will be arrested on motion.

99. People v. Hood, 6 Cal. 236.

dictment which alleges an unlawful sale of "spirituous or intoxicating liquor" is bad for uncertainty, even after a plea of nolo contendere.¹ And it has likewise been decided that an indictment is bad for uncertainty where it charged that the defendant "did carry a belt, or pocket pistol or revolver." And where in the same count in an indictment for larceny there was an alternative allegation as to the ownership of the property stolen it was held that the indictment was fatally defective and that no judgment could be given thereon.³

§ 262. Disjunctive averment not fatal—Instances.—Where an indictment for forgery stated two reasons why the forged instrument was not set out in haec verba and such reasons were connected by a disjunctive it was decided that as the averments did not relate to the statement of the charge or definition of the offense they did not render the indictment bad.<sup>4</sup> In a recent case in South Carolina it is decided that the use of the word "or" in the phrase "with a stone or iron hammer" in the allegation, in an indictment for murder, as to the instrument with which death was caused does not render the indictment defective for uncertainty or repugnancy on the ground that the offense is charged disjunctively.<sup>5</sup> And it has been decided that an indictment charging the defendant with the crime of "arson or barn burning" is sufficiently direct and certain, for though the technical offenses of arson and barn burning are charged in the alternative no one could be misled or

1. Commonwealth v. Grey, 2 Gray (Mass.), 501, 61 Am. Rep. 476. The court said: "A complaint or indictment on the statute should charge the defendant either with selling spirituous liquor, or with selling intoxicating liquor, or with selling spirituous liquor and intoxicating liquor." Per METCALF, J.

See, also, Grantham v. State, 89 Ga. 121, 14 S. E. 892, holding that an indictment which charges disjunctively that the accused sold a quantity of "spirituous, malt or intoxicating liquor" is bad on special demurrer. But see Cunningham v. State, 5 W. Va. 508; Thomas v. Commonwealth, 90 Va. 92, 17 S. E. 788.

- 2. State v. Green, 3 Heisk. (Tenn.)
  - 3. State v. Harper, 64 N. C. 129.
- State v. Callahan, 124 Ind. 364,
   N. E. 732.
- State v. Lark, 64 S. C. 350, 42
   E. 175.

misinformed as to the actual offense intended to be charged.<sup>6</sup> So the description in an indictment of an offensive writing sent to a person as a "letter or communication" has been held not erroneous there being no inconsistency in so describing it, for it was both a letter and communication.<sup>7</sup> And it has been held that an indictment charging the defendant with betting at a game of "hazard or skill" is not objectionable on account of the use of the disjunctive "or." <sup>8</sup>

§ 263. Surplusage does not vitiate.—It is a general rule that an indictment will not be vitiated by matter which is mere surplusage and that such matter need not be proved.<sup>9</sup> So where a public

Sublett v. Commonwealth, 18 Ky.
 Law Rep. 100, 35 S. W. 543.

Larison v. State, 49 N. J. L. 256,
 Atl. 700, 60 Am. St. Rep. 606.

State v. Hester, 48 Ark. 40, 2
 W. 339.

9. United States.—United States v. Paterson, 55 Fed. 605, 54 Fed. 1005; United States v. Clark, 46 Fed. 633; United States v. Lehman, 39 Fed. 768; United States v. Howard, 3 Sumn. 12; United States v. Burroughs, 3 McLean, 405; United States v. Larkin, 4 Cranch C. C. 617.

**Alabama.**—Paine v. State, 89 Ala. 26, 8 So. 133; Carden v. State, 89 Ala. 130, 7 So. 801.

Connecticut.—State v. Corrigan, 24 Conn. 286.

Illinois.—Barton v. People, 135 Ill. 405, 25 N. E. 776, 10 L. R. A. 302, aff'g 35 Ill. App. 573; Loehr v. People, 132 Ill. 504, 24 N. E. 68.

Indiana.—State v. Milder, 7 Blackf. 582; State v. Miller, 6 Ind. App. 653, 34 N. E. 27.

Iowa.—State v. Pierce, 77 Iowa, 245, 42 N. W. 181.

Kansas.—State v. Turney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 267.

Louisiana.—State v. McCarthy, 44 La. Ann. 323, 10 So. 673; State v. Smith, 41 La. Ann. 79, 6 So. 623.

Michigan.—People v. Aldrich, 104 Mich. 455, 62 N. W. 570; Turner v. Muskegon Circuit Judge, 95 Mich. 1, 54 N. W. 705.

New York.—People v. Altman, 86 Hun, 568, 33 N. Y. Supp. 905, 67 N. Y. St. R. 634; People v. Everest, 51 Hun, 19, 20 N. Y. St. R. 456; People v. Lohman, 2 Barb. 216; Biggs v. People, 8 Barb. 547.

North Carolina.—State v. Jordan, 110 N. C. 491, 14 S. E. 752; State v. Fain, 106 N. C. 760, 11 S. E. 593; State v. Wilson, 106 N. C. 718, 11 S. E. 254; State v. Harris, 106 N. C. 682, 11 S. E. 377.

**Rhode Island.**—State v. Wright, 16 R. I. 518, 17 Atl. 998.

**South Carolina.**—State v. Crawford, 38 S. C. 330, 17 S. E. 36.

**Texas.**—State v. Elliott, 14 Tex. 423; Rocha v. State, 43 Tex. Cr. 169, 63 S. W. 1018; Stebbins v. State, 31

offense is charged with reasonable certainty the indictment is good although the offense may not be charged with strict formality, and there may be surplusage in the indictment. 10 So though an indictment is not as concise as it might be yet if it is not so prolix as in any way to prejudice the defendant in making his defense, he cannot urge the prolixity as a ground for the reversal of the conviction.11 So it has been said in a case in New York that it is not a legal ground of attack upon an indictment that it contains more than is necessary under the provisions of the Code and that it has always been the rule that surplusage no more vitiates an indictment than it does a pleading in a civil action.<sup>12</sup> And it is said in an early case in this same State that mere surplusage will not vitiate an indictment and is no ground for reversing the judgment. In this case it was held that where an indictment alleges facts which constitute a misdemeanor, it will be good for that offense, although it states other facts which go to constitute a felony, provided all the facts alleged fall short of the charge of felony, in consequence of some other fact essential to that charge, such as that the intent of the party accused is not averred.13

§ 264. Surplusage may be rejected.—Matter, in an indictment, which is not essential to a correct and sufficient description of the offense may be disregarded as surplusage and rejected.<sup>14</sup> Matter

Tex. Cr. 294, 20 S. W. 552; Finney v. State, 29 Tex. App. 184, 15 S. W. 175; Cudd v. State, 28 Tex. App. 124, 12 S. W. 1010; Watson v. State, 28 Tex. App. 34, 12 S. W. 404.

Washington.—State v. Ackless, 8 Wash. 462, 36 Pac. 597.

Musgrave v. State, 133 Ind.
 37, 32 N. E. 885.

11. People v. Laurence, 137 N. Y. 517, 33 N. E. 547.

12. People v. Laurence, 137 N. Y. 517, 33 N. E. 547. Per EARL, J., citing Lohman v. People, 1 N. Y. 379; Dawson v. People, 25 N. Y. 399.

13. Lohman v. People, 1 N. Y. 379.

See, also, Dolan v. People, 6 Hun (N. Y.) 493.

14. United States.—Trenholm v. Commercial Nat. Bank, 38 Fed. 323.

Arkansas.—State v. Hand, 6 Ark. 165.

California.—People v. Fick, 89 Cal. 144, 26 Pac. 759.

Connecticut.—State v. Corrigan, 24 Conn. 286.

**Florida.**—Dansey v. State, 23 Fla. 316, 2 So. 692.

Idaho.—People v. Ah Hop, 1 Ida. 698.

Indiana.—Hull v. State, 120 Ind. 153, 22 N. E. 117.

which does not contradict any averment in the indictment, is not descriptive of the identity of the charge, or of anything essential to it and does not in any degree tend to show that no offense has been committed, may be rejected as it is a general rule that whenever an allegation may be wholly struck out of an indictment,

Iowa.—State v. Judd (Iowa, 1906), 109 N. W. 892; State v. Mahan, 81 Iowa, 121, 46 N. W. 855; State v. Freeman, 8 Iowa, 428.

Maine.—State v. Mayberry, 48 Me. 218; State v. Noble, 15 Me. 476.

Massachusetts.—Commonwealth v. Wright, 166 Mass. 174, 44 N. E. 129; Commonwealth v. Walker, 163 Mass. 226, 39 N. E. 1014; Commonwealth v. Delehan, 148 Mass. 254, 19 N. E. 221; Commonwealth v. Lord, 147 Mass. 399, 18 N. E. 67; Commonwealth v. Brown, 14 Gray, 419; Eastman v. Commonwealth, 4 Gray, 416; Commonwealth v. Bolkum, 3 Pick. 281.

Michigan.—People v. Calvin, 60 Mich. 113, 26 N. W. 851.

Missouri.—State v. Meyers, 99 Mo. 107, 12 S. W. 516; State v. Edwards, 19 Mo. 674.

**Nebraska.**—Hall v. State, 40 Neb. 320, 58 N. W. 929; State v. Ball, 27 Neb. 601, 43 N. W. 398.

New Hampshire.—State v. Webster, 39 N. H. 96; State v. Bailey, 31 N. H. 521.

New Jersey.—State v. Kern, 51 N. J. L. 259, 17 Atl. 114.

New York.—People v. Laurence, 137 N. Y. 517, 33 N. E. 547; Polinsky v. People, 73 N. Y. 65; Lohman v. People, 1 N. Y. 379; Crichton v. People, 1 Abb. Dec. 467; People v. Jackson, 3 Den. 101; Dolan v. People, 6 Hun, 493; La Beau v. People, 33 How. Pr. 66; People v. Gilkinson, 4 Park. Cr. R. 26.

North Carolina.—State v. Cozens, 6 Fed. L. 82.

Oklahoma.—Territory v. Gatliff, 2 Okla. 523, 37 Pac. 809.

Oregon.—Burchard v. State, 2 Oreg. 78.

**South Carolina.**—State v. Coppenburg, 2 Strobh. 273.

Tennessee.—State v. Brown, 8 Humph. 89.

**Texas.**—Stuart v. State (Tex. Cr. App. 1901), 60 S. W. 554; Hammons v. State, 29 Tex. App. 445, 16 S. W. 99.

Virginia.—Robertson v. Commonwealth (Va.), 20 S. E. 362.

Rejection of continuendo clause.—Where an indictment or count therein sufficiently charges a crime, but charges it with a continuendo, the continuendo clause thereof may be rejected as surplusage when the offense charged is not a continuing one and when such rejection leaves the indictment intact and otherwise unobjectionable. Eggart v. State, 40 Fla. 527, 25 So. 144.

Where one of two offenses insufficiently averred.—If one offense be sufficiently averred in an indictment the pleading will not be rendered bad by the fact that another offense also is insufficiently averred. In such a case the latter charge should be treated as surplusage. State v. Dawson (Ind. App. 1906), 78 N. E.

without injury to the charge, it may be rejected as surplusage.<sup>15</sup> So it is said in a case in Iowa that "where the defective averment may without detriment to the indictment, be wholly omitted, it may be considered as surplusage and disregarded.<sup>16</sup> And in an early case in Maryland it is decided that every fact and circumstance laid in an indictment which is not a necessary ingredient in the offense, may be rejected as surplusage, and if there be any defect in the manner of stating such matter it will not vitiate the indictment.<sup>17</sup>

§ 265. Same subject — Application and illustration of rule.— Where it is obvious that only one offense was designed to be charged in an indictment, although it contains a single expression not appropriate to the offense charged, and which would be proper in the description of a kindred offense, if the defendant could not be misled thereby as to the charge he is called upon to answer it will not render the indictment defective and may be rejected as surplusage.18 And where a count in an indictment alleged a breaking and entering into a dwelling with intent to steal goods therein and actual larceny therein, although that part charging larceny is not drawn with sufficient precision to support a conviction of larceny it is not for that reason bad as a count for burglary, for as the breaking and entering are charged to have been done with intent to commit larceny, a charge of actual larceny is not necessary and may be rejected as surplusage. 19 In an early case in New York it is decided that an indictment for murder at the common law charging the act to have been done with malice aforethought is not vitiated by the addition of the words that the act

<sup>352,</sup> citing Eagan v. State, 53 Ind. 162; Hatfield v. State, 9 Ind. App. 296, 36 N. E. 664.

In a description of a bank bill as "goods and chattels" the words "goods and chattels" may be rejected as surplusage and the count will be good. Turner v. State, 1 Ohio St. 422. See, also, Eastman v. Commonwealth, 4 Gray (Mass.), 416.

<sup>15.</sup> State v. Mayberry, 48 Me. 218. Per RICE, J.

<sup>16.</sup> State v. Freeman, 8 Iowa, 428. Per Stockton, J.

<sup>17.</sup> Rawlings v. State, 2 Md. 201.

<sup>18.</sup> Dawson v. People, 25 N. Y. 399.

<sup>19.</sup> State v. McClung, 35 W. Va. 280, 13 S. E. 654.

was done from a premeditated design to effect the death of the deceased, as the latter words may be rejected as surplusage.<sup>20</sup> And it was also decided in this case that in an indictment for murder, malice is but a circumstance in aggravation and an averment of malice may be rejected and a manslaughter proved.<sup>21</sup> Again, where an indictment charged an offense on a particular day and also on divers other days it was held to be good, it being declared that a day certain being alleged, the residue may be rejected as surplusage.<sup>22</sup>

§ 266. Same subject — Application and illustration of rule continued.—Where an indictment charged the defendant with a sale of liquors to a certain person it was held that the subsequent words "to divers other persons to the jurors aforesaid unknown" set forth no criminal offense and could be rejected as surplusage.<sup>23</sup> So it has been decided that the word "feloniously" may be rejected as surplusage.<sup>24</sup> So where an indictment for the common law misdemeanor of keeping a common gaming house charged that it was kept "feloniously" as well as unlawfully it was held that these allegations might be rejected as surplusage, thus rendering the indictment good for a nuisance at common law.<sup>25</sup> And it has been held that the word embezzle may be rejected as surplusage where introduced into a count but not in such a manner as to give the count the character of a charge of embezzlement.<sup>26</sup> Again in

People v. White, 22 Wend. (N.
 167.

21. People v. White, 22 Wend. (N. Y.) 167, 176, wherein Judge Cowen said: "It is the constant practice to reject the words 'malice aforethought,' in the common law indictment for murder and convict of manslaughter."

People v. Adams, 17 Wend. (N. Y.) 475.

23. State v. Jeffcoat, 54 S. C. 196,
32 S. E. 298, citing State v. May, 45
S. C. 512, 23 S. E. 513; State v. Cassety, 1 Rich. L. (S. C.) 90.

24. Commonwealth v. Philpot, 130 Mass. 59.

25. State v. Crummey, 17 Minn. 72. See State v. Judd (Iowa, 1906), 109 N. W. 892, holding that where, in an indictment for a felony, the word "feloniously" is unnecessarily inserted it may be treated as surplusage and rejected.

26. Commonwealth v. Simpson, 9 Metc. (Mass.) 138, so holding where an indictment charged that the defendant did "embezzle, steal, take and carry away" certain goods, and it was objected to on the ground of du-

an indictment for arson in burning a cotton house containing cotton it has been decided that an averment of the value of the house and its contents is mere surplusage and should be entirely disregarded.<sup>27</sup>

§ 267. Surplusage — Power of court to reject matter as — What may not be rejected.—The principle of law which permits unnecessary and harmless allegations in an indictment to be disregarded as surplusage, does not authorize the court to garble the indictment, regardless of its general tenor and scope, so as to entirely change the meaning.<sup>28</sup> And while immaterial averments may be rejected, there cannot be a rejection as surplusage of an averment which is descriptive of the identity of that which is legally essential to the claim or charge and this includes those allegations which operate by way of description or limitation on that which is material.<sup>29</sup>

§ 268. Use of a participial form.—Though it is said that the participial form of pleading is generally to be avoided, as not direct, yet in matter not constituting the main charge it is held sufficient if the intention of the indictment is plain.<sup>30</sup> In this

plicity in that it charged the two offenses of embezzlement and larceny.

27. Henderson v. State, 105 Ala. 82, wherein it is said: "The averment of value in the indictment is a matter of innocuous surplusage which should be entirely disregarded, rather than matter of description which must be proved." Per McClellan, J.

28. Littell v. State, 133 Ind. 577, 33 N. E. 817.

29. Fulford v. State, 50 Ga. 591; Hill v. State, 41 Tex. 253; State v. Freeman, 15 Vt. 722. See, also, United States v. Brown, 3 McLean (U. S.), 233; People v. Myers, 20 Cal. 76; Commonwealth v. Atwood, 11 Mass. 93. Descriptive averments must be literally proved.—State v. Canney, 19 N. H. 135, citing State v. Capp, 15 N. H. 212.

Though there is unnecessary particularity in matters of description, such description must be proved as alleged. Fulford v. State, 50 Ga. 591; Lewis v. State, 113 Ind. 59, 14 N. E. 892.

That which may have been the ground of conviction can not be rejected as surplusage. Commonwealth v. Atwood, 11 Mass. 93.

.30. State v. Bloor, 20 Mont. 574, 52 Pac. 611. Per Hunt, J., citing Bish. New Cr. Proc., §§ 555, 556; Bergen v. People, 17 Ill. 426.

connection it has been said that the desire to introduce greater directness and simplicity, or otherwise promote reforms in legal literature, must always be subordinate to the interests of justice. Courts are not permitted to be financially exacting respecting the construction of sentences or the graces of style.<sup>31</sup> And in a case in the United States Circuit Court of Appeals it is said of the use of the participial form that "this form of allegation is clearly sufficient in the Federal courts in misdemeanors, and also is in harmony with the common practice in all the courts." <sup>32</sup>

§ 269. Use of videlicet.—Even though in an indictment, matters which are essential, so that they must be positively alleged and proved, are stated under a videlicet, yet the averment may be taken as positive and certain. The use of the videlicet in such a case is to particularize or explain what, without it, would have been general or obscure.<sup>33</sup>

In State v. Manley, 107 Mo. 364, 17 S. W. 800, an indictment alleging that defendant "then and there being an officer duly elected . . . to wit, a constable," was held to sufficiently allege that he was an officer, although the word "being" was used instead of "was." The court said: "In the language of Lord Mansfield 'tenderness ought always to prevail in criminal cases, so far, at least, as to take care that a man may not suffer otherwise than by due course of law, but that tenderness does not require such a construction of words (perhaps not absolutely and perfectly clear and express), as would tend to render the law nugatory and ineffectual and destroy or evade the very end of it. Nor does it require that we should give into such nice and strained critical objections as are contrary to its true sense and spirit."

Use of word "being."-A mate-

rial averment may sometimes be introduced with as much clearness and certainty by means of the participial clause commenced by the word "being" as in the form of the direct proposition of a declarative sentence. State v. Dunning, 83 Me. 178, 22 Atl. 109. Per Whitehouse, J.

31. State v. Dunning, 83 Me. 178, 22 Atl. 109. Per Whitehouse, J., quoting 1 Bishop's Crim. Proc., § 356, as follows: "The doctrine is general that the court will consult sound sense to the disregard of captious objections in looking for the meaning of the allegations in the indictment."

**32.** Pooler v. United States, 127 Fed. 509, 62 C. C. A. 307. Per Putnam, J.

33. State v. Grimes, 50 Minn. 123, 52 N. W. 275. The court said: "The objection relied upon in respect to the indictment is founded on the use of the videlicet, which it is said makes

§ 270. Averment that matters are unknown to grand jury.—Facts which are not vital to the accusation, though they may be to a certain extent descriptive of the offense, may be stated in an indictment as unknown to the grand jury where this is the case.<sup>34</sup> And in a recent case in Florida it is said: "It is well settled in criminal pleading that the omission to state some matters of de-

uncertain the matters thus alleged. The objection is founded on the erroneous theory that what is alleged under a videlicet is never to be construed as a precise, positive averment. This may be true when what is thus pleaded is not essential in its nature, and so need not be proved as alleged. State v. Heck, 23 Minn. 549. where the matter alleged under a videlicet is essential, entering into the substantial description of the offense, the averment is regarded as positive and direct, and is traversable. It will then be treated as particularizing that which was before general, or as explaining that which was before obscure. . . . As to essential matters the allegations are to be regarded as positive, precise and traversable, although laid under the videlicet, and as to matters so nonessential that the pleader would not be concluded even by a positive averment the videlicet would not prejudice, though it be taken as indicating that the pleader does not undertake to prove the fact precisely as alleged." Per Dickinson, J.

The precise and legal use of a videlicet in every species of pleading is to enable the pleader to isolate, to distinguish and to fix with certainty that which was before general, and which, without such explanation, might with equal propriety have been applied to different objects. Commonwealth v. Hart, 10 Gray (Mass.), 465. Per MERRICK, J.

34. People v. Bogart, 36 Cal. 245; People v. Cronin, 34 Cal. 191; Commonwealth v. Sinclair (Mass. 1907), 80 N. E. 799, 801; People v. Stark, 136 N. Y. 538, 32 N. E. 1046, 49 N. Y. St. R. 899; Hughes v. State (Tex. Cr. App. 1900), 60 S. W. 562.

"It is a general rule that there should be such certainty of scription as will identify the offense, so that the party may not indicted forone thing tried for another." Certainty also required, to the end that the defendant may know what crime he is called upon to answer; that the jury may be able to determine an intelligible verdict, and the court to render the proper judgment; and, finally, that the defendant may be able to plead his conviction or acquittal in bar of another prosecution for the same offense. But this rule must not be carried so far as to furnish a shield from punishment, where it is plain that a crime has been committed; and, therefore, the indicting jurors are allowed to state that a particular fact, not vital to the accusation, is to them unknown." People v. Taylor, 3 Den. (N. Y.) 91, 95. Per Bronson, J.

scription not essential constituents of an offense, but which are required to be stated, if known, may be excused by an allegation that they were unknown to the indicting grand jury." 35

- § 271. Same subject Rule illustrated.—In indictments for larceny matters in reference to the description of property may in some cases be omitted where there is an averment, in excuse of the omission, that such matters are unknown to the grand jury.<sup>36</sup> And it is not a tenable objection to an indictment that it fails to state the names of the parties whom the defendants are alleged to have conspired to devise a scheme to use the post office establishment of the United States to defraud, if it contains a true statement that these persons were unknown to the grand jury.<sup>37</sup> And an indictment charging the commission of an offense "upon one———, a freedman, whose name is to the grand jurors unknown" has been held good.<sup>38</sup>
- § 272. Matters of inducement.—Matters of inducement need not be set out in detail or by direct charge but may be in general terms.<sup>39</sup> So it is said in an English case tried before Mr. Baron

35. Lang v. State, 42 Fla. 595, 598, 28 So. 856. Per MABEY, J., citing the following cases:

**Alabama.**—Leonard v. State, 115 Ala. 80, 22 So. 564; Grant v. State, 55 Ala. 201; DuBoise v. State, 50 Ala. 139.

California.—People v. Bogart, 36 Cal. 245.

**Florida.**—Porter v. State, 26 Fla. 56, 7 So. 145.

Indiana.—Queen v. State, 82 Ind. 72.

Massachusetts.—Commonwealth v. Sawtelle, 11 Cush. 142; Commonwealth v. Grimes, 10 Gray, 470, 71 Am. Dec. 666.

Michigan.—Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314. Minnesota.—State v. Taunt, 16 Minn. 109.

Montana.—Territory v. Bell, 5 Mont. 562, 6 Pac. 60; Territory v. Shipley, 4 Mont. 468, 2 Pac. 313.

New York.—Haskins v. People, 16 N. Y. 344.

South Carolina.—State v. Shirer, 20 S. C. 392.

**36**. Lang v. State, 42 Fla. 595, 28 So. 856.

37. Miller v. United States, 133 Fed. 337, 66 C. C. A. 399, citing Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.

38. State v. Elmore, 44 Tex. 102.

39. Mason v. State, 55 Ark. 529,

Parke that "there is a distinction between the allegation of facts constituting the offense, and those which must be averred by way of inducement. In the former case the circumstances must be set out with particularity; in the latter a more general allegation is allowed." 40 So in the case of an indictment for dissuading, hindering and preventing a witness from appearing before a court pursuant to a summons, the summoning of the witness being alleged only by way of inducement to the substance of the charge against the defendant it is held that it need not be alleged with the same certainty of time and place as the substance of the charge. 41

§ 273. Matters necessarily implied.—It is not necessary that there should be an express averment of matter which appears by necessary implication from that which is expressed.<sup>42</sup> "If an indictment or information contains direct and unequivocal averments of such facts, not being mere evidence, as lead immediately and of necessity to a single and inevitable conclusion, the omission

18 S. W. 827; State v. Mayberry, 48 Me. 218; Regina v. Wyatt, 2 Ld. Raym. 1191.

**40**. Regina v. Bidwell, 1 Denison's C. C. 222, 227.

41. Commonwealth v. Reynolds, 14 Gray (Mass.), 87, 74 Am. Dec. 665. Examine United States v. Cover, 46 Fed. 284.

42. Alabama.—Anthony v. State, 29 Ala. 27.

**Arkansas.**—Mason v. State, 55 Ark. 529, 18 S. W. 827.

California.—People v. McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61.

Florida.—Smith v. State, 29 Fla. 408, 10 So. 894.

**Georgia.**—Kitchens v. State, 80 Ga. 810, 7 S. E. 209

Illinois.—Palmer v. People, 138 Ill. 356, 28 N. E. 130.

Massachusetts.—Commonwealthv. Follansbee, 155 Mass. 274, 29 N.Y. 471; Commonwealth v. McCarty, 152 Mass. 577, 26 N. E. 140; Commonwealth v. Caldwell, 14 Mass. 330.

**Michigan.**—People v. Webb, 127 Mich. 29, 86 N. W. 406.

Minnesota.—State v. Sutler, 47 Minn. 483, 50 N. W. 532.

Mississippi.—Norton v. State, 72 Miss. 128, 16 So. 264, 18 So. 916.

New York.—People v. Bennett, 37 N. Y. 117; Paige v. People, 3 Abb. Dec. 439, 6 Park. Cr. R. 684.

North Carolina.—State v. Ballard, 6 N. C. 186.

Pennsylvania.—Gorman v. Commonwealth, 124 Pa. St. 536.

South Carolina.—State v. Maberry, 3 Strobh. 144.

Texas.—Caldwell v. State, 28 Tex. App. 566, 14 S. W. 122.

**Vermont.**—State v. La Bounty, 63 Vt. 374, 21 Atl. 730.

It is not necessary to explain the meaning of words used.— Sterne v. State, 20 Ala. 43.

to draw that conclusion expressly will not vitiate the pleading." 43 So where an indictment charged an actual poisoning it was held that an allegation that the substance administered was a poison was unnecessary.44 And in an indictment for forging a school warrant it is unnecessary to aver that the school district was a corporation where all school districts are corporations by statute.45 And in an indictment for refusing to answer a tithingman on the Lord's day, it was held, in an early case in Massachusetts, that it was not necessary to allege that the tithingman was sworn into office as to constitute a tithingman it was necessary allege that he that he should be sworn and to involved the allegation that he was tithingman application of this rule it has also been cided that a charge that a ballot box and the ballots cast by the electors on a certain day were destroyed imports the holding of an election on that day;47 that where the killing of a person by name is alleged in an indictment it is not necessary to allege that such person was a human being;48 that in an indictment for criminal malpractice it is not necessary to allege that the woman was pregnant;49 that there need be no averment that the woman was single in an indictment for seduction under promise of marriage; 50 that

- **43**. Evans v. People, 12 Mich. 27, 33. Per Campbell, J.
- 44. Anthony v. State, 29 Ala. 27, wherein it was declared that an allegation of an actual poisoning involves and includes, by necessary implication, an allegation that the substance employed was a poison. It was, however, said that an allegation of an attempt to poison does not, by necessary implication, involve or include an allegation that the substance employed in the attempt was in fact a poison, as such an attempt might be made by the administration of a substance not poisonous, but believed to be so by the person administering it, in which case it would not be an at-

tempt to poison within the meaning of the Code. See, also, State v. La Bounty, 63 Vt. 374, 21 Atl. 730.

- **45**. Ball v. State, 48 Ark. 94, 2 S. W. 462, wherein the court declared that it is never necessary in a pleading to aver a legal conclusion.
- 46. Commonwealth v. Caldwell, 14 Mass. 330.
- **47**. Mason v. State, 55 Ark. 529, 18 S. W. 827.
- **48**. Palmer v. People, 138 Ill. 356, 28 N. E. 130. See People v. McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61.
- **49**. Commonwealth v. Fallansbee, 155 Mass. 274, 29 N. E. 471.
- 50. Norton v. State, 72 Miss. 128,16 So. 264, 18 So. 916.

the birth of a child need not be averred in an indictment for adultery and bastardy;<sup>51</sup> and that an averment that a person killed another by shooting sufficiently charges the infliction of a mortal wound.<sup>52</sup>

- § 274. Legal conclusions.—It is a general rule that mere legal conclusions should not be stated in an indictment.<sup>53</sup> And the want of necessary allegations in describing the offense cannot be supplied by averring conclusions of law.<sup>54</sup> Again where a statute describes a particular act, or acts, as a crime of a particular grade, it is not necessary, in an indictment upon the statute, after charging the acts, to state the legal conclusion that they amount to the crime of the grade declared—for such is the conclusion of the law on the facts alleged.<sup>55</sup>
- § 275. Legal conclusions Application of rule.—In pleading the judgments or proceedings of inferior courts of special and limited jurisdiction, and of magistrates and officers acting under a statute or special authority a general averment of jurisdiction is not sufficient, but the facts upon which it depends must be averred. <sup>56</sup> So an allegation that the person assaulted was engaged
- 51. Gorman v. Commonwealth, 124 Pa. St. 536.
- **52.** Caldwell v. State, 28 Tex. App. 566, 14 S. W. 122.
- **53**. **Alabama.**—See State v. Absence, 4 Port. 397.

California.—Ex parte Goldman (Cal. App. 1906), 88 Pac. 819.

Indiana.—State v. Trueblood, 25 Ind. App. 437, 57 N. E. 975.

Massachusetts.—See Wells v. Commonwealth, 12 Gray, 326; Commonwealth v. Goulding, 135 Mass. 552.

**New York.**—Hall v. People, 90 N. Y. 498.

**Ohio.**—See Whiting v. State, 48 Ohio St. 220, 27 N. E. 96.

Washington.—State v. Friars, 10 Wash. 348, 39 Pac. 104.

- 54. State v. Graham, 38 Ark. 519; State v. Record, 56 Ind. 107; Commonwealth v. Clark, 4 Ky. Law Rep. 622; State v. Fitts, 44 N. H. 621; People v. Cooper, 3 N. Y. Cr. R. 117.
- 55. Guest v. State, 19 Ark. 405, citing Absence v. State, 4 Ala. 397; Anderson v. State, 5 Ark. 452; Check v. State, 7 Humph. (Tenn.) 161. Compare State v. Eno, 8 Minn. 220. See sections in next chapter herein as to stating the name of the offense.
- People v. Weston, Sheld. (N. Y.) 555.

in the execution of a "lawful process or mandate" has been held defective. And the words "illegal" and "unwarranted "58 or "lawfully "59 are conclusions of law and an indictment is insufficient where it contains merely words of such a character without a statement of facts.

§ 276. Matters of which court will take judicial knowledge.—Matters of which the court has judicial knowledge need not be averred in an indictment any more than in ordinary pleadings in civil cases. 60 So regulations prescribed by the president and by the heads of departments, under authority conferred by Congress, are executive acts which have the force of law and of the existence of which courts will take judicial notice. 61 And where an indict-

57. People v. Cooper, 3 N. Y. Cr. 117. Judge VANN said in this case: "Whether the process was lawful or not, depended upon certain facts of which the defendant had a right to notice, but which are not set forth in the indictment. It is a mere conclusion to plead that the process was lawful. The defendant, at least, had the right to know the general nature of the process or mandate, the date when it was issued, and by what court or officer, so that upon the trial he could be prepared with appropriate evidence to meet the accusation. The lawfulness of the process is an essential part of the offense, and it must be established by proof before a conviction can be had of assault in the second degree. The facts from which the legal conclusion follows that the process or mandate was lawful, must be alleged before that proof can be received."

58. State v. Trueblood, 25 Ind. App. 437, 57 N. E. 975.

59. Commonwealth v. Clark, 4 Ky. Law Rep. 622.

60. Sands v. State, 80 Ala. 201; People v. Breese, 7 Cow. (N. Y.) 429; People v. Fadner, 10 Abb. N. C. (N. Y.) 462; Owen v. State, 5 Sneed (Tenn.), 493.

Judicial notice of the laws of a State will be taken. United States v. Wright, 28 Fed. Cas. No. 16,774.

Civil divisions of the State created by statute will be taken judicial notice of by the courts. People v. Breese, 7 Cow. (N. Y.) 429, cited in Acton v. State, 80 Md. 547, 31 Atl. 419.

61. Wilkins v. United States, 96 Fed. 837, 37 C. C. A. 538, holding that where an indictment charged a violation of such a regulation, which was made an offense by statute, an omission to set out such regulation was not a fatal defect, though the court declared that a careful pleader out of an abundance of caution might specifically recite it. See, in this connection, Coha v. United States, 152 U. S. 221, 14 Sup. Ct. 513; United States v. Eaton, 144 U. S. 688, 12 Sup. Ct. 767.

ment alleged the embezzlement or larceny of "eighty dollars in money, consisting of ten dollar bills, currency of the United States of America, a more particular description of which is unknown to the grand jury," it was held that no averment or proof as to the value of the money was necessary since the court judicially knows that such bills are, as matter of law, worth their face value. 62 The court will also take notice that a public road or highway is a public place. 63 Again in an indictment for arson a description of the property burned as "the jail of Wilcox county" was held to be a sufficient averment of ownership, it being declared that the court judicially knew that county jails in the State were the property of the several counties in which they were severally located and that each county in the State was a body corporate.64 And acts prescribing the limits of counties and towns are public acts of which the court will judicially take notice. 65 But it has been decided that judicial notice of a city ordinance will not be taken,66 and that the ordinance should be pleaded, at least in substance. <sup>67</sup> And in an indictment under the Liquor Tax Law in New York for selling liquor in a town after the electors of that town have voted that no licenses shall be granted it is decided that the accused is entitled to have that fact stated in the indictment that he may know the precise nature of the charge against him.68 Where, how-

62. Gady v. State, 83 Ala. 51, 3 So. 429. See, also, Duvall v. State, 63 Ala. 12, wherein it is said: "It is matter of law that the commercial value of United States treasury notes is what their face imports." Per STONE, J.

63. State v. Warren, 57 Mo. App. 502, so holding where in an indictment for an affray the charge of place was "a certain public road and highway," and the statute read "in any public place."

64. Sands v. State, 80 Ala. 201.

65. Commonwealth v. Springfield, 7 Mass. 9. The court said: "Our county limits, and also the bound-

aries of our several towns, are prescribed by public statutes, of which we are bound judicially to take notice. When, from these limits or boundaries, it appears that every part of any town is in the same county, of that fact we can judicially take notice." Per Parsons, J.

See Schilling v. Territory, 2 Wash. Ter. 283.

**66**. Garland v. City of Denver, 11 Colo. 534, 19 Pac. 460.

67. Iowa v. Olinger, 109 Iowa, 660, 80 N. W. 1060. See Green v. City of Indianapolis, 22 Ind. 192; City of Winona v. Burke, 23 Minn. 254.

68. People v. Bates, 61 App. Div.

ever, a person was indicted for the offense of keeping and offering for sale at his store in the city and county of New York impure and unwholesome milk "against and in violation of the provisions of the sanitary code" and an objection to the indictment was made on the ground that it did not set out the ordinance alleged to have been violated, the court declared that the objection was not sound and that the reference to the sanitary code rendered the indictment sufficient, at least so far as matter of substance was concerned.<sup>69</sup>

§ 277. Matters of evidence.—Where particular facts are to be regarded as matters of evidence it is a general rule that they need not be minutely described in charging the offense. The inserting of matters of this kind not only encumbers but in many cases tends to obscure the meaning of the indictment or to make the prosecution more difficult of a successful accomplishment. An indictment is not, however, vitiated by stating matters of evidence therein. The successful accomplishment of evidence therein.

(N. Y.) 559, 71 N. Y. Supp. 123,
citing Jefferson v. People, 101 N. Y.
19, 22; People v. Olmsted, 74 Hun
(N. Y.), 323, 26 N. Y. Supp. 818.

69. Schrumpf v. People, 14 Hun (N. Y.), 10, citing People v. McCann, 67 N. Y. 507; Nellis v. New York C. R. R. Co., 30 N. Y. 505; Polinsky v. People, 11 Hun (N. Y.), 390; People People, 11 Hun (N. Y.), 390; People v. Special Sessions, 7 Hun (N. Y.), 214.

70. United States.—Stokes v. United States, 157 U. S. 187, 39 L. Ed. 667, 15 S. Ct. 617.

Alabama.—Sterne v. State, 20 Ala. 43.

Indiana.—State v. McCormack, 2 Ind. 305.

Massachusetts.—Commonwealth v. Johnson, 175 Mass. 152, 55 N. E. 804.

**New Jersey.**—Mead v. State, 53 N. J. L. 601, 23 Atl. 264.

New York.—People v. Willis, 158 N. Y. 392, 53 N. E. 29, aff'g 34 App. Div. 203, 54 N. Y. Supp. 642; Tully v. People, 67 N. Y. 15; Tuttle v. People, 36 N. Y. 431.

**England.**—King v. Baxter, 5 Term. R. 83.

Indictment charging violation of United States statutes relating to distilled spirits.-An indictment charging the use of vessels "for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States," is broad enough to advise the defendant of the nature of the offense charged and the nature and means whereby the unlawful use of the still and other vessels was procured is matter of evidence to establish the imputed intent and not of allegation in the indictment. United States v. Simmons, 96 U.S. 360.

71. State v. Broughton, 71 Miss. 90, 13 So. 885.

72. State v. Broughton, 71 Miss. 90, 13 So. 885.

§ 278. Matters of evidence—Rule illustrated.—In an indictment for promoting and aiding in the promotion of a lottery which averred that the defendant did during a certain period of time "induce others, for a valuable consideration, to take chances and pretended drawings of a certain lottery called the Kentucky State Lottery," it was held that it was not necessary to specify the particular acts done, or methods resorted to, to induce persons to take chances or to purchase tickets, as the material fact to be proved was that the defendant did induce others to take chances, and the particular acts or modes of inducement were circumstances or facts which constituted the evidence of the principal or material fact and need not be set out in the indictment. 73 And in a case in New York it is decided that though in an indictment for mayhem, premedited design must be averred, it is not necessary to state the manner in which such design was evinced as the circumstances establishing this are matters of evidence to be proved on the trial.<sup>74</sup> And in an indictment for bribery the value and kind of the money received as a bribe need not be alleged.<sup>75</sup> Again, where a person was indicted under a statute which provided "that any person or persons who shall, by placards or other writing, or verbally, attempt by threats, direct or implied, of injury to the person or property of another, to intimidate such other person into an abandonment or change of home or employment" should be guilty of a felony, it was held that it was unnecessary for the indictment to

73. Miller v. Commonwealth, 13 Bush. (Ky.) 731.

74. Tully v. People, 67 N. Y. 15. Judge Andrews said in this case: "It is insisted that the indictment is defective in not averring the manner in which the premeditated design was evinced. This was unnecessary. . . . The conduct of the accused before and at the time of the transaction, the preparation made, and his lying in wait, his threats and declarations tending to show his intention in making the assault, with many other facts

and circumstances which might be suggested, may be given in evidence upon the issue of premeditation, but it would be improper, and often impracticable, to spread them out in the indictment."

75. State v. Meysenburg, 171 Mo. 1, 71 S. W. 229. See Commonwealth v. Donovan, 170 Mass. 228, 49 N. E. 104; Commonwealth v. Hussey, 111 Mass. 432; State v. Howard, 66 Minn. 309, 68 N. W. 1096; Watson v. State, 39 Ohio St. 123.

state whether the threats were verbal or in writing—whether direct or implied,—as these matters related merely to the proof.<sup>76</sup>

§ 279. Matters of defense.—Matters of defense need not be anticipated by the State so as to require an averment in an indictment of facts which will rend them unavailable.<sup>77</sup> So it is said in an early case in Indiana that it is not necessary that an indictment should negative every conceivable fact that may change the character of an offense.<sup>78</sup> In the application of this rule it has

**76**. Breeland v. State, 79 Miss. 527, 31 So. 104.

77. United States.—Stokes v. United States, 157 U. S. 187, 39 L. Ed. 667, 15 S. Ct. 617; United States v. Patterson, 59 Fed. 280.

Georgia.—Jordan v. State, 22 Ga. 545.

Indiana.—Payne v. State, 74 Ind. 203; State v. Shoemaker, 4 Ind. 100.

**Iowa.**—State v. Niers, 87 Iowa, 723, 54 N. W. 1076; State v. Conable, 81 Iowa, 60, 46 N. W. 759.

Maine.—State v. Brewer (Me. 1906), 66 Atl. 642.

Massachusetts.—Commonwealth v. Hart, 11 Cush. 130.

Missouri.—State v. Ford, 47 Mo. App. 601.

North Carolina.—State v. Kerby, 110 N. C. 558, 14 S. E. 856; State v. Murphy, 101 N. C. 697, 8 S. E. 142.

Texas.—State v. Rupe, 41 Tex. 33; Jenkins v. State, 36 Tex. 638.

In indictment for rape.—People v. Wessel, 98 Cal. 352, 33 Pac. 216, holding, in the case of an information charging rape upon the person of a female child under the age of fourteen years, that it was not necessary to state that the defendant was a male or over the age of fourteen

years, or, if under that age, that he possessed physical ability, as the averment that he was capable was implied in the charge that he wilfully and feloniously committed the act, and if he was incapable of committing the offense such fact might be shown in defense, citing People v. Ah Yek, 29 Cal. 576; Commonwealth v. Lugland, 4 Gray (Mass.), 7; Commonwealth v. Sullivan, 6 Gray (Mass.), 479; Commonwealth v. Scannell, 11 Cush. (Mass.) 548.

Unless there are exceptions in the statute which defines the crime, negative averments are not ordinarily necessary in criminal pleading. State v. Webb's River Improvement Co., 97 Me. 559, 55 Atl. 495.

78. State v. Gooch, 7 Blackf. (Ind.) 468, holding that an indictment against an unmarried man for living in open and notorious fornication with a certain woman, need not aver that she is unmarried, for, if the guilty accomplice of the defendant were a married woman, it would be a matter of which the defendant could avail himself on the trial, and, by proving her married, be acquitted of the charge of fornication.

been decided that excuses and justifications are matters of defense and that there is no such a presumption of their existence as requires the State to allege that they do not exist.<sup>79</sup> Exceptions in a statute creating an offense are also, as a general rule, to be regarded as matters of defense which the defendant must prove to withdraw himself from the operation of the statute.<sup>80</sup> And it is decided that the excepted cases need not be negatived in an indictment under a statute and proof is not required to be made in the first instance on the part of the prosecution. In such cases a defendant charged with the crime, who seeks protection by reason of the exception, has the burden of proving that he comes within the same.<sup>81</sup> So in an indictment for selling intoxicating liquor to a minor it is not a good objection to the sufficiency of the indictment that it contains no averment that the defendant knew the one to whom the liquor was sold to be under the age of twenty-one.<sup>82</sup>

In this connection it has been declared that where an offense is created by statute and there is an exception in the enacting clause, the indictment must negative the exception, but if there be a proviso which furnishes matter of excuse to the party, it need not be negatived in the indictment, but he must show it if he would avail himself of it.<sup>83</sup> And in a recent case in Iowa it is said: "The general rule as to exceptions, provisos, and the like is that where the exception or proviso forms a portion of the description of the

79. Payne v. State, 74 Ind. 203.

80. State v. Long (N. C. 1907), 57 S. E. 349, citing State v. Goulden, 134 N. C. 746, 47 S. E. 450; State v. Norman, 13 N. C. 222; Murray v. Reg., 7 Q. B. 706.

81. State v. Hicks (N. C. 1907), 57 S. E. 441, so holding in the case of an indictment for unlawfully practicing dentistry without having passed an examination and obtained the certificate required by law. The indictment was under a statute which excepted a certain class.

82. Ward v. State, 48 Ind. 289. See Goetz v. State, 41 Ind. 162, holding that the burden of proof is on the defendant to make out the defense that he, in good faith, made the sale in the bona fide belief that the purchaser was an adult. Farbach v. State, 24 Ind. 77.

83. State v. Godfrey, 24 Me. 232, 41 Am. Dec. 382. Per Tenney, J., citing Speirs v. Parker, 1 Term. R. 145, 6 Term. R. 559; Rex v. Jarvis, 1 East, 644, 645, note h; Burnett v. Hind., 3 Johns. R. (N. Y.) 438; Teele v. Fond, 4 Johns. R. (N. Y.) 304; Commonwealth v. Odlin, 23 Pick. (Mass.) 275.

offense so that the ingredients thereof cannot be accurately and definitely stated if the exception is omitted, then it is necessary to negative the exception or proviso. But where the exception is separable from the description and is not an ingredient thereof, it need not be noticed in the accusation; for it is a matter of defense." But where there is an exception so incorporated with the enacting clause, that the one cannot be read without the other, then it is held that the exception must be negatived.<sup>85</sup>

§ 280. When question as to sufficiency of charge may be raised.—It may be stated as a general rule that the question as to the sufficiency of an indictment, in regard to the statement of facts sufficient to constitute a public offense may be raised at any stage of the case. And it has been said by the United States Supreme Court: "The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment

84. State v. Kendig (Iowa, 1907), 110 N. W. 462. Per DEEMER, J., citing United States v. Cook, 17 Wall. (U. S.) 168, 21 L. Ed. 538; State v. Powers, 25 Conn. 48; Hale v. State, 58 Ohio St. 676, 51 N. E. 154.

85. Steel v. Smith, 1 Barn. & Ald. 94. Per Bayley, J., quoted in Commonwealth v. Hart, 11 Cush. (Mass.) 130, 135.

86. Shivers v. Territory, 13 Okla. 466, 74 Pac. 899. "This question goes to the jurisdiction of the court to render a judgment in the case, and the question of jurisdiction of the subject matter, or to render a judgment of conviction in a case, may

be raised at any time and for the first time in the Supreme Court." Per BURFORD, J.

See Vincent v. People, 15 Abb. Pr. (N. Y.) 234.

A plea of guilty does not preclude a defendant from attacking an information on the ground that it charges no offense. State v. Ulrich, 96 Mo. App. 689, 70 S. W. 933, citing State v. Levy, 119 Mo. 435.

After a plea of nolo contendere an indictment may be attacked on the ground that it does not allege the offense to be contra formam statuti. Commonwealth v. Town of Northampton, 2 Mass. 116.

against another prosecution for the same offense." 87 decided that a defect which is one of substance is not cured by a plea of guilty and that the defect may be urged in arrest of judgment.88 And in a case in Iowa it is said by the court: could not, in a criminal case, affirm a judgment when it appears that the defendant is charged with no offense against the laws, though he should in no stage of the proceedings, either in this court or in the court below, object on that ground." 89 It is also said in a case in Missouri: "If any fact, word or circumstance which forms a necessary ingredient in, or a material description of, the offense be omitted in the indictment, such omission vitiates the indictment and of such vitiation defendant may avail himself by demurrer, motion in arrest or by writ of error." 90 So in a case in England it was held that in an indictment for publishing an obscene book, described only by its title, the word alleged to be obscene must be set out and that the omission could not be cured by a verdict of guilty.91

§ 281. Same subject continued.—In this connection it is said in a recent case in the United States Circuit Court of Appeals that while a defendant may by a motion in arrest of judgment raise the question whether the substance of the crime is charged against him, it is not good practice as it in many cases imposes an unnecessary burden upon the court, upon the government and upon the

87. Rosen v. United States, 161 U.S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606.Per Mr. Justice HARLAN.

88. State v. Carpenter, 54 Vt. 551, so holding in the case of an indictment under the statute for hindering an officer in the execution of his office where it did not allege that the defendant had knowledge that such officer was one of the officers described in the statute.

89. State v. Potter, 28 Iowa, 554. Per Beck. J.

90. State v. Hagan, 164 Mo. 654,

65 S. W. 249. Per Sherwood, J., citing Rex. v. Osmer, 5 East, 304; Rex v. Everett, 8 B. & C. 114; Rex v. Norton, 8 C. & P. 196; Rex v. Jackson, 1 Leach, 303.

91. Bradlaugh v. Queen, 3 Q. B. D. 607, rev'g Queen v. Bradlaugh, 2 Q. B. D. 569. Lord Justice Brett declared in this case that "in every kind of crime which consists in words, if the words complained of are not set out in the indictment or information, the objection is fatal in arrest of judgment."

accused. 92 And in another case it is declared that the policy of waiting until after the trial of the case and then making a motion in arrest of judgment was not favored at the common law.93 in North Carolina it is declared that where the defendant thinks that an indictment, otherwise objectionable in form fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal.94 And in Oregon it has been decided that though it is provided by Code that an indictment shall contain "a statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended,"95 yet an indictment which follows the language of the statute in charging an assault with intent to kill is sufficient after verdict though it contains no statement of the acts constituting the offense.96 And a late case in California, decided under the Code, is in line with these decisions.97

§ 282. Same subject — Defects cured by verdict.—There are said to be many defects and uncertainties in criminal pleading which would be fatal on a motion to quash which are not available on a motion in arrest. In many cases averments which may not be technically correct will be regarded as only imperfect statements of that which the law implies to be true after verdict. And it is declared that where the nature of the charge may be gathered with

<sup>92.</sup> Clement v. United States, 149 Fed. 305 (C. C. A.).

<sup>93.</sup> Barber v. State (Fla. 1906), 42 So. 86.

<sup>94.</sup> State v. Shade, 115 N. C. 757, 20 S. E. 537, citing State v. Brady, 107 N. C. 826, 12 S. E. 325.

<sup>95.</sup> Oreg. Crim. Code, § 69.

<sup>96.</sup> State v. Doty, 5 Oreg. 491.

<sup>97.</sup> People v. Chadwick (Cal. App.

<sup>1906), 87</sup> Pac. 384, holding that under Cal. Pen. Code, §§ 1004(3), 1012, an objection that an indictment charges two offenses, where it is apparent upon the face of the indictment, is waived in case of a failure to take objection by demurrer.

<sup>98.</sup> Woodworth v. State, 145 Ind. 276, 43 N. E. 933.

<sup>99.</sup> Coffin v. United States, 162 U.S. 664, 16 Sup. Ct. 943.

reasonable certainty from the language used, the fact that the offense is not set out with technical amplitude and accuracy, though it may have been a sufficient cause for exception before trial is not a ground for arresting the judgment. And in a case in California it is said: "It is only when a quality material and necessary to the constitution of a crime, is altogether omitted, and not where such quality is imperfectly described, that a judgment will be set aside as not sustained by the indictment and entered without authority of law; unless it be a case where the court has no jurisdiction to enter the judgment at all." 2 In a case in Vermont it is also said by the court: "We understand the rule to be that, in support of a verdict the court will presume to have been proved upon trial any fact, the existence of which must have been involved in, or was inferable from, the proof of those which were alleged and which the verdict has found.3 So though the words used in describing an offense may not be as definite as they might have been made yet where they are sufficiently certain to inform the defendant of the nature and character of the offense with which he is charged, an objection thereto on such ground will not avail where made for the first time after verdict.4 And mere defects in the manner or form of charging and describing the first offense in an indictment charging what is known as a "second offense" are held to be cured by the verdict where not demurred to.5

§ 283. Same subject — Application of rule.—Where certain persons were authorized by an act of the Legislature to erect a dam across a river which had by prescription become a public highway, in a certain manner, and within prescribed limits, and they had proceeded to erect a dam across the river at or near the same, and an indictment at common law was found against them for causing

- 1. Pennaman v. State, 58 Ga. 337.
- 2. People v. Swenson, 49 Cal. 388. Per McKinstry, J.
- 3. State v. Freeman, 63 Vt. 496, 22 Atl. 621, citing Gould's Plead., ch.
- X, § 20. See, also, State v. Ryan, 68 Conn. 512, 37 Atl. 377.
- State v. Marshall, 2 Kan. App.
   792, 44 Pac. 49. See State v. Knowles, 34 Kan. 393.
- State v. Ryan, 68 Conn. 512, 37
   Atl. 377.

a nuisance by the erection of the dam, it was held that the indictment was insufficient and that on the return of a verdict of guilty thereon, judgment must be arrested, there being no averment that the dam was beyond the limits prescribed in the charter or that it was not erected in pursuance of the authority given by the statute.6 And where an offense attempted to be charged is what is known as "a second offense," the existence of the first offense should be alleged as this is one of the essential elements of the charge, and a failure to allege it constitutes a fatal defect which may be taken advantage of not only upon demurrer but also upon a motion in arrest of judgment.7 And where an indictment was defective by reason of its failure to aver that the crime was done feloniously it was held that the defect was not waived by the entry of the plea of not guilty and the swearing of the jury.8 But where a count for a misdemeanor in an indictment for setting fire to a barn erroneously charged the defendant with "feloniously" burning the barn it was held that the mistake could not avail the defendant after verdict of guilty on said count, but that the word "feloniously" would be considered as surplusage.9 Again, where the defendant was indicted under the provisions of the Federal statute making it unlawful to deposit obscene literature in the United States mails and he pleaded guilty, without demurrer, and after verdict of guilty moved the court in arrest of judgment upon the ground that the indictment did not charge that he had knowledge of the contents of the paper alleged to be lewd and obscene, it was decided

- State v. Godfrey, 24 Me. 232, 41
   Am. Dec. 382.
- 7. State v. Ryan, 68 Conn. 512, 37 Atl. 377, holding it sufficient, however, where it was only charged indirectly and inferentially that the defendant committed a first offense.
- 8. Stroud v. Commonwealth, 14 Ky. Law Rep. 179, holding that even after such plea and swearing of the jury, the defendant's demurrer to the

indictment should have been sustained.

9. Staeger v. Commonwealth, 103 Pa. St. 469. The court said: "If the act charged was a misdemeanor, this mistake of the pleader cannot avail after verdict. It was surplusage, and if objection had been taken at the trial could have been stricken out. Mere technical matters which do not affect the merits receive less consideration now than they did a century ago." Per Paxson, J.

that objection was not available after verdict, there being an averment in the indictment that he "unlawfully, wilfully, and knowingly deposited and caused to be deposited in the post office . . . a certain obscene, lewd and lascivious paper." <sup>10</sup> But in another case an indictment under a statute for publishing and distributing an obscene paper containing an obscene picture or figure which fails to give any description of the paper, figure or picture sufficient to advise the defendant of the nature of the charge and accusation against him has been held to be fatally defective and it is decided that such defect is not cured by a verdict of guilty. <sup>11</sup>

§ 284. Same subject — Effect of statutory provisions.—In some jurisdictions it is provided by statute that no indictment or information is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon its merits. <sup>12</sup> Under

10. Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. Mr. Justice HARLAN said: "He must have understood from the words of the indictment that the government imputed to him knowledge or notice of the contents of the paper so deposited. In their ordinary acceptation, the words 'unlawfully, wilfully, and knowingly,' when applied to an act or thing done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing; and when used in an indictment in connection with the charge of having deposited in the mails an obscene, lewd, and lascivious paper, contrary to the statute in such case made and provided, could not have been construed as applying to the mere depositing in the mail of a paper the contents of which at the time were wholly unknown to the person depositing it. The case, therefore, is not one of the total omission from the indictment of an essential averment, but, at most, one of the inaccurate or imperfect statement of a fact; and such statement, after verdict, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused."

11. Reyes v. State, 34 Fla. 181, 15 So. 875.

12. Downing v. United States, 8 Ariz. 31, 68 Pac. 555; Rev. Stats. Ariz. 1887, par. 1467; Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606; U. S. Rev. St., § 1025.

The omission of the word "feloniously" in charging an offense is not under a statute of this character a ground for arrest of judgment where words conveying the same meaning are used, and the omission of the word did not tend to

such a statute it has been decided that where there is not a total omission of an essential averment, such as an averment of intent, a defect therein will be regarded as an inaccurate or imperfect statement of a fact which amounts to a defect in form merely and not of substance which cannot be taken advantage of after verdict by a motion in arrest of judgment. 13 But it was decided that an offense was not "certainly and substantially described" within the meaning of a statute curing defects, where the indictment charged the stealing of "\$150 in United States currency" and that the defect was not cured by a verdict of guilty.14 And in Mississippi it has been decided that a Code provision that all objections either to the form or substance of an indictment, shall be made before verdict only, only applies to those cases where the defect is of such a character that the accused may waive it either expressly or by his silence and does not apply to the case where the indictment does not contain a sufficient description of the offense to notify the accused of the "nature and cause of the accusation against him," which right is secured to him by the constitution of the State.<sup>15</sup>

§ 285. Bill of particulars — Right to generally.—Where the offense is stated in such general terms in an indictment that it does not so sufficiently apprise the defendant of the crime with which he is charged that he may properly prepare his defense, the court will as a general rule, except in some jurisdictions, <sup>16</sup> direct that a

prejudice any of the substantial rights of the accused. State v. Smith, 31 Wash. 245, 71 Pac. 767, decided under Bal. Code, §§ 6849, 6850.

13. Downing v. United States, 8 Ariz. 31, 68 Pac. 555, so holding in the case of an indictment for attempting to rob the mails, where the only averment as to intent was that the defendant "willfully made an attempt to rob the United States mail."

14. Merrill v. State, 45 Miss. 651, holding the defect fatal where the indictment did not specify the currency

stolen, whether gold, silver or paper, or the denomination.

15. Newcomb v. State, 37 Miss. 383.

16. Alabama.—Jones v. State, 136 Ala. 118, 34 So. 236.

Iowa.—United States v. Ross, Morris, 164.

Kentucky.—Commonwealth v. Moore, 2 Dana, 402.

Missouri.—State v. Quinn, 40 Mo. App. 627.

Texas.—State v. Williams, 14 Tex. 98.

bill of particulars be furnished by the prosecution.<sup>17</sup> So it is said in a recent case in Florida: "Where the counts or charges in an indictment or information are so general in their nature that they do not fully advise the accused of the crime with which he is charged so that he could properly prepare his defense, upon a proper showing made to the trial court by the defendant in a motion, verified by affidavit, the court has the power to order the furnishing of a bill of particulars by the prosecution and should

17. United States.—Dunlop v. United States, 165 U. S. 486, 17 S. Ct. 375; United States v. Adams Express Co., 119 Fed. 240.

Delaware.—State v. McDaniell, 4 Penn. 96, 54 Atl. 1056.

**Florida.**—Mathis v. State, 45 Fla. 46, 34 So. 28; Thalheim v. State, 38 Fla. 169, 20 So. 938.

Idaho.—State v. Rathbone, 8 Ida. 161, 67 Pac. 186.

Illinois.—Gallagher v. People, 211 Ill. 158, 71 N. E. 842; Dubois v. People, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183; Towne v. People, 89 Ill. App. 258.

**Kansas.**—State v. Conley, 1 Kan. App. 124, 41 Pac. 980.

Louisiana.—City of New Orleans v. Chappnis, 105 La. 179, 29 So. 721.

**Maryland.**—Jules v. State, 85 Md. 305, 36 Atl. 1027.

Massachusetts.—Commonwealthv. Sinclair (Mass. 1907), 80 N. E. 799; Commonwealth v. Hartford (Mass. 1907), 79 N. E. 784; Commonwealth v. Snelling, 11 Pick. 432.

**Michigan.**—People v. McKinney, 10 Mich. 54.

**New Jersey.**—State v. Hatfield, 66 N. J. L. 443, 49 Atl. 515.

**New York.**—Eighmy v. People, 79 N. Y. 546; People v. Tweed, 63 N. Y. 194.

North Carolina.—State v. Van

Pelt, 136 N. C. 633, 49 S. E. 177; State v. Howard, 129 N. C. 584, 40 S. E. 71.

Ohio.—State v. Langan, 31 Wkly. Law Bull. 33.

Pennsylvania.—Goersen v. Commonwealth, 99 Pa. St. 388; Williams v. Commonwealth, 91 Pa. St. 493; Commonwealth v. Genirerette, 10 Pa. Super. Ct. 598; Commonwealth v. Havens, 6 Pa. Ct. Ct. Rep. 545; Commonwealth v. Rosenberg, 1 Pa. Co. Ct. R. 273.

Rhode Island.—State v. Tracey, 12 R. I. 216.

Vermont.—State v. Davis, 52 Vt. 376; State v. Rowe, 43 Vt. 265.

**Washington.**—State v. Dix, 33 Wash. 405, 74 Pac. 570.

England.—Rex v. Hodgson, 3 Carr. & P. 422; Reg. v. Flower, 3 Jur. 558.

The office of a bill of particulars is to advise the court, but more particularly the defendant, of what facts, more or less in detail, he will be required to meet. United States v. Adams Express Co., 119 Fed. 240.

A motion for a bill of particulars should be in writing.— State v. McDaniel, 4 Penn. (Del.) 96, 54 Atl. 1056.

The proper time to interpose motion for a bill of particulars is before pleading to the merits.

do so." <sup>18</sup> Such bill of particulars will, however, only be required in those cases where the indictment or information does not of itself definitely and specifically set forth the facts, but sets them forth only vaguely or in such general terms that the defendant could not well know what he is required to defend against. <sup>19</sup> The motion should particularly set forth the portions of the indictment or information which the defendant claims to require amplification by bill of particulars and point out to the court wherein he desires a fuller statement of the facts. <sup>20</sup> In a case in Pennsylvania, however, it is decided that in a murder case the district attorney will not be required to file a bill of particulars where it appears that the prisoner and his counsel were present at the preliminary hearing before the justice of the peace and heard all the testimony deemed necessary to procure the commitment for the crime charged in the indictment. <sup>21</sup>

§ 286. Matter of requiring bill of particulars is in discretion of court.—The accused is not as a matter of legal right entitled to

Mathis v. State, 45 Fla. 46, 60, 34 So. 28.

When defendant not entitled to bill of particulars-statute as to quashing .- Where it is provided by statute that an indictment must state the facts constituting the offense in such a clear, full and certain manner as to reasonably apprise the defendant of what he is required to meet, and that any failure to do this may be reached by a motion to quash, it is declared that whenever a trial judge finds it necessary to the administration of justice to grant a bill of particulars, he has found an ample reason for quashing the indictment for uncertainty, and that in such a case the defendant is not entitled to a bill of particulars. Sherrick v. State (Ind. 1906), 79 N. E. 193.

Bill of particulars in case of indictment for abortion.—In a recent case in Massachusetts it is decided that, under the statute, in the case of an indictment for an abortion, if the charge is not set out with sufficient fullness in that it does not state the nature, kind and description of the instrument which the defendant was charged with having used or the way and manner in which he was claimed to have used it, the defendant has the right to require a bill of particulars. Commonwealth v. Sinclair (Mass. 1907), 80 N. E. 799. See Mass. Rev. Laws, c. 218, § 39.

18. Mathis v. State, 45 Fla. 46, 60, 34 So. 28. Per Shackleford, J.

19. State v. Reno, 41 Kan. 674, 679, 21 Pac. 803. Per VALENTINE, J.

20. Mathis v. State, 45 Fla. 46, 60, 34 So. 28. Per SHACKLEFORD, J. State v. Reno, 41 Kan. 674, 679, 21 Pac. 803.

21. Commonwealth v. Eagan, 190 Pa. 10, 42 Atl. 374.

a bill of particulars but the application therefor is one which is addressed to the discretion of the court,22 and it has been declared that its action thereon is not subject to review.23 So it is said in a recent case in Florida "such an application or motion, however, is not founded upon a legal right, but is a matter resting within the sound legal discretion of the court, depending entirely upon the nature and circumstances of each particular case as they appear to the court before whom the trial is had, and the refusal of the trial judge to grant such motion will not be disturbed or reversed by an appellate court, unless there was an abuse of such discretion." 24 In this connection it has been determined by the United States Supreme Court that the right of the accused to be informed of the nature and cause of the accusation against him is not infringed "by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and that. in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the

22. United States.—United States v. Adams Express Co., 119 Fed. 240.

**Florida.**—Mathis v. State, 45 Fla. 46, 34 So. 28; Brass v. State, 45 Fla. 1, 34 So. 307.

Idaho.—State v. Rathbone, 8 Ida. 161, 67 Pac. 186.

**Illinois.**—Dubois v. People, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183.

Massachusetts.—Commonwealth v. Farrell, 105 Mass. 189; Commonwealth v. Wood, 4 Gray, 11; Commonwealth v. Giles, 1 Gray, 466.

**New Jersey.**—State v. Hatfield, 66 N. J. L. 443, 49 Atl. 515.

New York.—Eighmy v. People, 79 N. Y. 546; People v. Tweed, 63 N. Y. 194.

North Carolina.-State v. How-

ard, 129 N. C. 584, 40 S. E. 71.

Pennsylvania.—Commonwealth v. Eagan, 190 Pa. St. 10, 42 Atl. 374; Commonwealth v. McClure, 1 Pa. Co. Ct. R. 182.

Vermont.—State v. Davis, 52 Vt. 376; State v. Bacon, 41 Vt. 526, 98 Am. Dec. 616.

23. Dunlop v. United States, 165 U. S. 486, 491, 17 Sup. Ct. 375. Per Mr. Justice Brown, citing Rosen v. United States, 161 U. S. 29, 35, 16 Sup. Ct. 434, 480; Commonwealth v. Giles, 1 Gray (Mass.), 466; Commonwealth v. Wood, 4 Gray (Mass.), 11; State v. Bacon, 41 Vt. 526, 98 Am. Dec. 616.

24. Mathis v. State, 45 Fla. 46, 60, 34 So. 28. Per Shackleford, J. In this case the question is considered at length and the authorities reviewed.

paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted, or refused, as the court in the exercise of a sound legal discretion, may find necessary to the ends of justice." <sup>25</sup>

§ 287. Bill of particulars not part of indictment — Effect of granting motion for.—A bill of particulars is no part of the indictment<sup>28</sup> or of the record and is not open to demurrer.<sup>27</sup> The right to a bill of particulars is for the benefit of the defendant and does not deprive him of the right to have the bill of indictment quashed if insufficient.<sup>28</sup> If the indictment be not demurrable upon its face, it does not become so by the addition of a bill of particulars.<sup>29</sup> Nor will a bill of particulars operate to cure the omission of a material averment in the indictment.<sup>30</sup> And it is decided that the court will limit the government in its evidence to those facts set forth in the bill of particulars.<sup>31</sup> Again, the court may permit an amendment of a bill of particulars.<sup>32</sup>

25. Rosen v. United States, 161 U. S. 29, 40, 16 Sup. Ct. 434, 40 L. Ed. 606. Per Mr. Justice Harlan, who declares that the above is the doctrine to be deduced from the American cases.

26. Jules v. State, 85 Md. 305, 36 Atl. 1027.

A bill of particulars affects the proof and mode of trial only, and not the indictment. Commonwealth v. Davis, 11 Pick. (Mass.) 432.

27. Commonwealth v. Davis, 11 Pick. (Mass.) 432. See United States v. Adams Express Co., 119 Fed. 240.

Where a defendant has been allowed to demur, instead of excepting to the first bill of particulars, and his demurrer has been sustained, and an amended bill of particulars filed, he will not be heard to complain of this ruling. Jules v. State, 85 Md. 305, 313, 36 Atl. 1027.

28. State v. Van Pelt, 136 N. C.

633, 641, 49 S. E. 177.

29. Dunlop v. United States, 165 U. S. 486, 491, 17 Sup. Ct. 375. Per Mr. Justice Brown. See State v. Dix, 33 Wash. 405, 74 Pac. 570, holding that a bill of particulars is not part of an information, and though it may show an intent to prove more than one crime, it does not render the information demurrable.

30. United States v. Bayard, 16 Fed. 376.

31. United States.—United States v. Adams Express Co., 119 Fed. 240, 242.

Illinois.—McDonald v. People, 126 Ill. 150, 18 N. E. 817.

Massachusetts.—Commonwealthv. Snelling, 15 Pick. 321.

North Carolina.—State v. Van Pelt, 136 N. C. 633, 49 S. E. 177.

Pennsylvania.—Williams v. Commonwealth, 91 Pa. St. 493.

32. Jules v. State, 85 Md. 305, 36 Atl. 1027.

### CHARGING THE OFFENSE—PARTICULAR AVERMENTS.

#### CHAPTER XI.

#### CHARGING THE OFFENSE-PARTICULAR AVERMENTS.

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Sec. 288. Name of offense - Failure to state. - Although as a matter of form it is said to be the better practice to name the offense in the indictment yet a failure to do so will not render it vulnerable to a demurrer or other objections.33 And it is a general rule that it is not necessary to the validity of an indictment that it should state the name of the offense where the statement of facts is sufficiently descriptive thereof.34 So in an early case in Nevada it is said: "That part of the indictment charging the defendant with the commission of a crime by name is simply formal and could be entirely omitted. It is only a conclusion from the facts which are afterwards recited. It was not required at the common law."35 And it is said in an early case in Minnesota: "The facts constituting the offense must be stated, and from those facts the law determines its nature, which cannot be affected by any term or appellation, which the grand jury may apply, or fail to apply to it."36 But where by a law which prescribes the form of an indictment it must charge both the crime and the act constituting it, the omission of either is fatal.37

§ 289. Name of offense — Failure to state correctly.—An indictment which does not correctly charge the name of the offense but which correctly defines the offense in the charging part is good.<sup>38</sup>

33. State v. Baldy, 17 Iowa, 39.

34. United States v. Lehman, 39 Fed. 768; State v. Baldy, 17 Iowa, 39; State v. Rigg, 10 Nev. 284; Massie v. State, 5 Tex. App. 81.

35. State v. Anderson, 3 Nev. 254. Per Lewis, J. See People v. Sullivan, 4 N. Y. Cr. R. 193.

36. State v. Hinckley, 4 Minn. 345.

Per ATWATER, J. Cited and followed in State v. Coon, 18 Minn. 518.

37. People v. Dumar, 116 N. Y. 502, 13 N. E. 325, decided under Code of Criminal Procedure, § 275.

38. United States. — United States v. Lehman, 39 Fed. 768.

Georgia.—Aiken v. State, 90 Ga. 452, 16 S. E. 206.

"An error in designating the name of the crime in the commencement of the indictment is an irregularity only. The charging part of the indictment must be alone considered in determining whether the indictment charges a public offense. If it states facts showing the commission of a crime by the defendant, the law determines its name and nature, and neither a misnomer of the crime nor the omission to give it a name affects the validity of the indictment." So the failure to state the correct legal appellation of the crime in the charging part of an indictment has been held to be a defect of form which if subject to objection should have been taken advantage of by a special demurrer and the defendant not having done so it is decided that he can not raise the objection, by a motion in arrest of judgment where the facts stated constitute a public offense. 40

§ 290. Same subject — Where offense created by statute.— Where the offense is one created by a statute which gives it no name but merely describes it all that is necessary is a brief general description of the offense as given by law.<sup>41</sup> So in a case in Arizona it is said that where no specific name is given to an offense in the statute if the acts constituting the offense, as defined by statute, are sufficiently stated, even though the indictment fails to give the proper appellation of the crime, it is a mere irregularity in matter

Iowa.—State v. Ansaleme, 15 Iowa, 44.

Kentucky.—See Commonwealth v. Smith, 6 Bush, 263.

Minnesota.—State v. Munch, 22 Minn. 67; State v. Hinckley, 4 Minn. 345

Nevada.—State v. Anderson, 3 Nev. 254.

New York.—People v. Sullivan, 4 N. Y. Cr. R. 193, 197.

But see People v. Maxon, 57 Hun, 367.

Oregon.—State v. Jarvis, 18 Oreg. 360, 23 Pac. 251. But see State v. Smythe, 33 Tex. 546.

39. State v. Howard, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. R. 403, 34 L. R. A. 178. Per START, J., citing State v. Hinckley, 4 Minn. 345; State v. Garvey, 11 Minn. 95; State v. Coon, 18 Minn. 464; State v. Munch, 22 Minn. 67.

40. State v. Johnson, 9 Nev. 175.

41. Knoxville Nursery Co. v. Commonwealth, 108 Ky. 6, 55 S. W. 691; Commonwealth v. Scroggin, 22 Ky. Law Rep. 1338, 60 S. W. 528; Daviess Gravel-Road Co. v. Commonwealth, 14 Ky. Law Rep. 812; Commonwealth v. Slaughter, 12 Ky. Law Rep. 893.

of form, not tending to the prejudice of the defendant.<sup>42</sup> In Kentucky it has been decided that it is essential to the validity of an indictment under the Criminal Code that the name of the offense should be given in the accusative part of the indictment and that where a statute which creates an offense gives it no name but merely describes it, an indictment under the statute should in naming the offense, follow the statute.<sup>43</sup>

- § 291. Same subject Statutory provisions affecting.— Under the provisions of the statutes or codes in some states though an indictment give an erroneous appellation, or fail to give any appellation to the offense, if the acts constituting the offense are sufficiently stated, the indictment will be sufficient.<sup>44</sup> And under a statutory provision that no indictment is to be held insufficient for any surplusage or repugnant allegation where there is sufficient matter alleged to indicate clearly the offense, and the person charged, an incorrect designation of the offense by name may be rejected as surplusage where the offense is clearly described by the statement of facts therein.<sup>45</sup>
- § 292. Name of offense Application of rules.—Where the grand jury accuses the prisoner of manslaughter and the body of the indictment makes a charge of murder it is held to be no ground for arresting the judgment.<sup>46</sup> And where a motion in
- **42.** Brady v. Territory (Ariz. 1900), 60 Pac. 698. Per Davis, J., citing People v. Phipps, 39 Cal. 326; People v. Cuddihi, 54 Cal. 53.
- **43**. Commonwealth v. Slaughter, 12 Ky. Law Rep. 893.
- **44.** People v. Phipps, 39 Cal. 326; Cal. Crim. Prac. Act, §§ 237, 246.
- 45. State v. Davis, 41 Iowa, 311, holding that where the crime was designated in the indictment as manslaughter, but the statement of facts described the crime of murder the word "manslaughter" was properly rejected as surplusage. State v. Shaw.
- 35 Iowa, 575, holding where an offense was incorrectly designated by the name "nuisance" and the facts alleged defined another offense, the word "nuisance" could be rejected as surplusage.
- 46. Camp v. State, 25 Ga. 689. The court said: "If the grand jury had found a bill throughout for murder, on the trial, the petit jury might have acquitted the prisoner of murder and found him guilty of manslaughter. The prisoner is not prejudiced by the change of a single word, manslaughter for murder. He is rather

arrest of judgment was based on the contention that the indictment did not charge the defendant with murder in the first degree in haec verba it was decided that the contention was untenable where the indictment did charge him with that crime by setting forth all the facts necessary to constitute it with great particularity, and with all the qualifying words used in approved precedents.47 where facts are alleged in an indictment which constitute perjury it is not necessary to charge in haec verba that the defendant committed perjury.48 And where the body of an indictment set out a breaking and entering to steal but did not aver that the crime was committed in the night time, the fact that the crime was designated as burglary in the caption or formal averments at the commencement of the indictment was held to be immaterial.<sup>49</sup> Again where a statute describes a particular act or acts, as a misdemeanor or crime of a particular grade, it is not necessary, in an indictment, after charging the acts, to state the legal conclusion, that they amount to a misdemeanor or crime of the grade declared by statute, since such is the conclusion of the law, on the facts alleged.<sup>50</sup> And in an indictment for larceny, where certain acts are made larceny by statute, it is competent for the pleader to frame the indictment as for larceny at common law, or to charge only the specific acts which the act declares shall be deemed larceny, as in the latter case the legal conclusion deducible from these facts is drawn by the act itself, and need not of necessity be drawn in the indictment.51

benefited, for he cannot be found guilty of murder. He was arraigned on the indictment as it stands and pleaded not guilty. If he wished to demur to the indictment for any matter not affecting the real merits of the charge he ought to have done it on arraignment, before pleading the general issue. It is too late after pleading the general issue, and undergoing a trial thereon; for no motion in arrest of judgment can be sustained for any matter not affecting the real merits of the offense charged in the indictment." Per McDonald, J.

47. Territory v. O'Donnell, 4 N. M. 66, 12 Pac. 743.

48. United States v. Wood, 44 Fed. 753; Massie v. State, 5 Tex. App. 81.

**49**. State v. Gillett, 92 Iowa, 527, 61 N. W. 169. See State v. Coon, 18 Minn. 518.

50. State v. Alsence, 4 Port. (Ala.) 397; Guest v. State, 19 Ark. 405; Commonwealth v. Goulding, 135 Mass. 552; Wells v. Commonwealth, 12 Gray (Mass.), 326; Whiting v. State, 48 Ohio St. 220, 27 N. E. 96.

51. Leftwich v. Commonwealth, 20 Gratt. (Va.) 716.

### § 293 Charging the Offense—Particular Averments.

§ 293. Means or manner of commission of offense.—The means or manner of effecting the criminal intent, or the circumstances evincive of the design with which the act, illegal in itself, was done, are generally considered to be matters of evidence to the jury to demonstrate the intent, and not necessary to be incorporated in the indictment.1 The rule is stated in an early case in Maine as follows: "When the act to be accomplished is itself criminal or unlawful, it is not necessary to set out in the indictment the means by which it is to be accomplished; but, when the act is not in itself criminal or unlawful, the unlawful means by which it is to be accomplished must be distinctly set out." So in indictments for assaults it has been held unnecessary to set out the means used.<sup>3</sup> And it is held that the means with which the offense was committed is not in an indictment for murder a constituent element of the offense, it being declared that it is the unlawful killing with malice aforethought which constitutes murder regardless of the means employed.4 And in an indictment

United States.—United States
 Wentworth, 11 Fed. 52. Per CLARK, J.

**Alabama.**—Gaines v. State (Ala. 1906), 41 So. 865.

California.—People v. Hyndman, 99 Cal. 1, 33 Pac. 782.

**Georgia.**—Travis v. State, 83 Ga. 372, 9 S. E. 1063.

Louisiana.—State v. Smith, 41 La. Ann. 791, 6 La. 623.

Maine.—State v. Ames, 64 Me. 386. Maryland.—State v. Falkenham, 73 Md. 463, 21 Atl. 370.

**New York.**—People v. Farrell, 28 N. Y. St. R. 43, 8 N. Y. Supp. 230; People v. Bush, 4 Hill, 133.

2. State v. Mayberry, 48 Me. 218. Per Rice, J.

3. State v. Clayton, 100 Mo. 516, 13 S. W. 819. See State v. Smith, 41 La. Ann. 791, 6 So. 623, holding that the manner in which an assault was made need not be set out in an indictment for assault with a dangerous weapon with intent to murder. But see Territory v. Carrera, 6 N. M. 593, 30 Pac. 872.

4. Gaines v. State (Ala. 1906), 41 So. 865, holding that an omission to aver the means employed, though in a sense a defect of substance, yet it is such a defect as must be taken advantage of by demurrer. People v. Hyndman, 99 Cal. 1, 33 Pac. 782. See Commonwealth v. Robertson, 162 Mass. 90, 38 N. E. 25. But see Newton v. State (Fla. 1906), 41 So. 19; Adams v. State, 28 Fla. 511, 10 So. 106; Jackson v. State, 34 Tex. Cr. App. 38, 28 S. W. 815.

The want of technically accurate terms in stating the means used does not render an indictment insufficient. People v. Willett, 105 Mich. 110, 62 N. W. 1115.

for larceny charging one of the defendants with aiding and abetting in the commission of the crime it has been held that the means by which the aiding and abetting was done need not be specified.<sup>5</sup>

§ 294. Same subject continued.—Where the gist of an offense is the illegal means employed it is essential that the acts constituting these means should be specifically charged and set out in an indictment.<sup>6</sup> So an indictment charging a conspiracy to do an act which is not necessarily a crime subjecting a perpetrator of such an act to punishment is held to be fatally defective where it does not specify the means by which the defendants designed to effect their purpose.<sup>7</sup> Thus it is declared that cheating and defrauding a person was not necessarily an offense at common law and that to sustain an indictment for a conspiracy to cheat and defraud a person of his property it should appear by averments in the indictment that the act was to be accomplished by criminal or unlawful means.<sup>8</sup> Again in the case of an indictment for abortion it is held that the means used should be stated.<sup>9</sup>

The means used may be averred in the alternative.—Wilson v. State, 84 Ala. 426, 4 So. 383. See State v. O'Neil, 51 Kan. 651, 33 Pac. 287. Where so averred it is held that each alternative averment should be construed as a separate count. Smith v. State, 142 Ala. 14, 39 So. 329.

- People v. Seldner, 62 App. Div.
   (N. Y.) 357, 71 N. Y. Supp. 35.
- 6. State v. Potter, 28 Iowa, 554, citing State v. Jones, 13 Iowa, 269; State v. Roberts, 34 Me. 321; Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 224; Commonwealth v. Shedd, 7 Cush. (Mass.) 514.
- 7. State v. Roberts, 34 Me. 320; Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Territory v. Carland, 6 Mont. 14, 9 Pac. 578.

An indictment for conspiracy

- to do an act in itself a crime need not allege the means used. State v. Grant, 86 Iowa, 216, 53 N. W. 120; Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620. See Commonwealth v. Lutz (Pa.), 9 Lanc. L. Rev. 241.
- 8. State v. Mayberry, 48 Me. 218. But see State v. Brady, 107 N. C. 822, 12 S. E. 325.
- 9. In the case of an indictment for an abortion the name and description of the instrument and the manner of its use generally will be essential to a complete description of the offense charged. The grand jury is required to state the means used to bring about the abortion, with as much certainty as the nature of the evidence before them will warrant. Commonwealth v. Sinclair (Mass. 1907), 80 N. E. 799. But see Cave v. State, 33 Tex. Cr. 335, 26 S. W. 503.

## § 295 CHARGING THE OFFENSE—PARTICULAR AVERMENTS.

§ 295. Same subject - Statutory provisions - Constitutionality of.—In some States it is provided by law that in an indictment for murder or manslaughter it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused but that it shall be sufficient in every indictment for murder to charge that the defendant did wilfully, feloniously and of his malice aforethought kill and murder the deceased. 10 And a statute to this effect is not in violation of a constitutional provision securing to the accused the right "to demand the nature and cause of the accusation against him."11 or of the sixth article of the amendments to the Constitution of the United States, as the latter is not a limitation upon the powers of the States of the Union but upon the government of the United States.<sup>12</sup> And though it is provided by the constitution of the State "that no person shall be held to answer, until the accusation against him is formally, fully and precisely set forth, that he may know of what he is accused, and be prepared to meet the exact charge against him," it has been decided that an indictment for murder need not set out the manner in which and the means by which the killing was perpetrated.13 So in a case in which an objection to an indictment for murder was made on the ground that it did not disclose the nature and cause of the accusation. because it did not set forth the instrumentality used to commit the alleged murder and how such instrumentality was used by the respondents to accomplish the crime charged, the court said: "The means used to commit murder is not of the essential legal elements of that crime, although the means used to cause death, and the

decided under Tex. Pen. Code, art. 538.

Littell v. State, 133 Ind. 577,
 S. E. 417; Ind. Rev. St., 1881, §
 Graves v. State, 45 N. J. L.
 46, 46 Am. Rep. 778. See Criminal Proc. Act, § 45; State v. Moore, 104
 C. 743, 10 S. E. 183; Caldwell v. State, 28 Tex. App. 566, 14 S. W. 122.

11. Newcomb v. State, 37 Miss.383, construing Rev. Code, art. 265,p. 616. Wolf v. State, 19 Ohio St.

248, construing Code of Crim. Proc., § 92; Goersen v. Commonwealth, 99 Pa. St. 388, construing Act of March 31, 1860, §§ 11, 20, Pamph. L. 433; State v. Noakes, 70 Vt. 247, 40 Atl. 249, construing Vt. Stat., § 1907; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559, construing Laws 1871, ch. 137, § 12.

12. State v. Noakes, 70 Vt. 247, 40 Atl. 249.

13. State v. Verrill, 54 Me. 408.

manner of their use may be evidence tending to show that the crime of murder has been committed. It is an elementary principle of pleading that it is never necessary to allege in an indictment mere matter of evidence unless it alters the offense. <sup>14</sup> There is nothing in the constitution of Vermont which precludes the Legislature from dispensing with the necessity of stating the means, manner and circumstances of the killing, in an indictment for homicide." <sup>15</sup>

§ 296. Averment as to place generally.—It is a general rule, except so far as modified by statute, that an indictment should state the place where the offense was committed so that it may appear that the court has jurisdiction. <sup>16</sup> So it is said in an early

14, Clark's Crim. Proc. 166.

State v. Noakes, 70 Vt. 247,
 40 Atl. 249. Per Thompson, J.

16. United States. — United States v. Brown, 58 Fed. 558; United States v. McCabe, 58 Fed. 557.

California.—People v. O'Neil, 48 Cal. 257.

Florida.—Connor v. State, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126.

Illinois.—See Nicholls v. People, 40 Ill. 395.

Indiana.—Newcome v. State, 27 Ind. 10.

Maine.—State v. Wagner, 61 Me.

Missouri.—Missouri v. Cook, 1 Mo. 547.

Nebraska.—McCoy v. State, 22 Neb. 418, 35 N. W. 202.

Nevada.—State v. Chamberlain, 6 Nev. 257.

New Jersey.—Halsey v. State, 4 N. J. L. 324.

New York.—Crichton v. People, 6 Park, Cr. R. 363.

South Dakota.—State v. Burchard, 4 S. D. 548, 57 N. W. 491.

Texas.—Searcy v. State, 4 Tex. 450; Smith v. State, 25 Tex. App. 454, 8 S. W. 645; Orr v. State, 25 Tex. App. 453, 8 S. W. 644.

Vermont.—State v. Bacon, 7 Vt. 219.

West Virginia.—State v. Ellison, 49 W. Va. 70, 38 S. E. 574; State v. Hobbs, 37 W. Va. 812, 17 S. E. 380.

"Every material fact must be stated with time and place in order that the grand jury may appear to have jurisdiction to find the bill, and also that the petit jury may be drawn from the proper county to try the case." Regina v. O'Connor, 52 B. 16, 31. Per Lord DENMAN, C. J., quoted in Commonwealth v. Wheeler, 162 Mass. 429, 38 N. E. 1115.

Where jurisdiction exists only in certain cases such facts should be alleged as show that the court may entertain jurisdiction in the case in question. Hunter v. State, 29 Ind. 80; Parker v. State, 18 Ind. 424; Jones v. State, 18 Ind. 179; Gorden v. State, 18 Ind. 152; Harrison v. State,

case in New Hampshire: "The place where a crime is alleged to have been committed must be stated in such manner as to show that the court have jurisdiction of the offense. It must be stated with such certainty that the respondent may be fully informed of the charge in this respect, as well as others; and with such distinctness

17 Ind. 422; Justice v. State, 17 Ind. 56.

In an indictment for negligent homicide it is not necessary to allege the exact locality in the city in which the offense was committed, it being sufficient to state the name of the city and county. People v. Buddensieck, 4 N. Y. Cr. R. 230, aff'd 103 N. Y. 487, 3 N. Y. St. R. 664, 5 N. Y. Cr. R. 69.

An indictment for maintaining a liquor nuisance sufficiently alleges the place by an averment that such nuisance was carried on in a certain room in a building, particularly identified. State v. Cox, 82 Me. 417, 19 Atl. 857.

In an indictment for the sale of intoxicating liquors the place in the city where the alleged sale was made should be stated. Arrington v. Commonwealth, 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242, determining the sufficiency of an indictment for violation of Va. Pub. Acts 1889-1890, p. 242, § 1.

Where a statute makes it an offense to disturb religious worship in certain places an indictment thereunder should state that the offense was committed in one of the places specified. State v. McClure, 13 Tex. 23.

That an affray occurred in a public place is sufficiently charged by an averment that it took place in a certain public road and highway.

State v. Warren, 57 Mo. App. 502.

Offense committed on a high-way.—Under a statute providing that "every person who shall shoot at a mark along or across a public high-way shall be adjudged guilty of a misdemeanor" it is essential that an indictment should designate the particular highway on which the offense was committed. State v. Hogan, 31 Mo. 340.

In an indictment for fraudulent registration under the United States Revised Statutes (U. S. Rev. St., § 5512), the election district in which the alleged fraudulent registration took place should be alleged where the provisions of the State laws as to the registration of voters differ in different parts of the district in which the court is held. United States v. Brown, 58 Fed. 558; United States v. McCabe, 58 Fed. 557.

In an indictment for false tokens and swindling, the procuring the goods is a material fact and it must appear where they were procured. State v. Bacon, 7 Vt. 219.

Where the venue of an accessional act is not laid in an indictment it will be bad on demurrer. State v. Ellison, 49 W. Va. 70, 38 S. E. 574.

Where a town is indicted for not repairing a highway the indictment will be defective if it fails to show in which of two towns the unrepaired part of the highway lay. that the judgment rendered upon the indictment may be pleaded in bar to any second indictment for the same offense."<sup>17</sup>

§ 297. Averments as to place — Qualifications of general rule. —Where an objection is merely technical and the substantial rights of the defendant are not affected it should not be sustained. And in an indictment for a misdemeanor it is held that the same strictness is not required in this respect as in an indictment for a felony. And it has been declared that the general rule

Commonwealth v. North Brookfield, 8 Pick. (Mass.) 463.

The court is sufficiently designated and described in an indictment for perjury by an averment that the offense was committed in a certain town and county in the State, in the court of a certain designated person, a justice of the peace, and that such court possessed authority to administer an oath. State v. Stein, 48 Minn. 466, 51 N. W. 474.

17. State v. Cotton, 24 N. H. 143. Per EASTMAN, J.

18. State v. Buralli, 27 Nev. 41, 71 Pac. 532, so holding where it was contended that the act creating the county stated that "there shall be a county to be known as Lyon County," and deciding that it was fatal to describe the county in the indictment as the "County or Lyon."

The words "in this State" after the word "person" may be omitted in an indictment though used in the statute creating the offense, it being declared that they are surplusage in the statute, if it is true that penal laws are presumed to have no extra territorial application where they do not expressly provide for it, and that the use of such words in a statute simply limit the prohibition

of the statute to the State by express words, which is the limit without them. State v. Cook, 38 Vt. 437.

"Name need not be established beyond a reasonable doubt .-- If the evidence raises a violent presumption that the offense was committed within the county, or if the evidence refers to localities and landmarks at or near the scene of the alleged offense, known or probably familiar to the jury, from which they may reasonably infer that the offense was committed in the county, it will be sufficient." McKinnie v. Strickland, 44 Fla. 143, 32 So. 786. Per TAYLOR, J., citing Warrace v. State, 27 Fla. 362, 8 So. 748; Smith v. State, 29 Fla. 408, 10 So. 894; Duncan v. State. 29 Fla. 439, 10 So. 815; Leslie v. State, 35 Fla. 184, 17 So. 559.

19. Taylor v. State, 6 Humph. (Tenn.) 285.

The general rule is, that in indictments for offenses of commission, every act which is a necessary ingredient in the offense must be laid with time and place. In cases of felony, in favorem vitae, the rule is strictly enforced; but in indictments for misdemeanors. if time and place be added to the first act, it will be construed to refer equally to all the ensuing

### § 298 Charging the Offense—Particular Averments.

requiring certainty of averment of time and place may never be disregarded in alleging the acts complained of but that it does not apply to those descriptive or definitive portions of the indictment, whose office it is to qualify or limit the object acted upon as to show it to be the proper subject of complaint, unless time or place is an element necessary to constitute it a proper subject, and the existence of this element would be susceptible of question if not averred. Upon this principle it is said much of the apparent conflict of authorities upon this subject is reconcilable.<sup>20</sup>

§ 298. Averments as to county or town.—An indictment should as a general rule state the county in which the alleged offense was committed.<sup>21</sup> And in many cases it is particularly

acts, although in practice it is usual to repeat the averment. State v. Dayton, 23 N. J. L. 49, 53 Am. Dec. 270. Per Chief Justice GREEN.

20. State v. Cook, 38 Vt. 437. Per STEELE, J.

21. Florida.—McKinnie v. State, 44 Fla. 143, 32 So. 786; Cook v. State, 20 Fla. 802.

**Kentucky.**—Armstrong v. Commonwealth, 16 Ky. Law R. 494, 29 S. W. 342.

Massachusetts.—Commonwealth v. Springfield, 7 Mass. 9.

New York.—Guston v. People, 61 Barb. 35.

Tennessee.—Hite v. State, 9 Yerg. 357.

Texas.—See Satterwhite v. State, 6 Tex. App. 609.

Virginia. — Jones v. Commonwealth, 86 Va. 950, 12 S. E. 950.

Washington.—State v. Mayberry, 9 Wash. 193, 37 Pac. 284.

Compare United States v. Kershaw, 5 Utah, 618, 19 Pac. 194.

Offenses on railroad trains are by statute in some States indictable in any county through which the train passes or in which the trip terminates. People v. Webber, 133 Cal. 623, 66 Pac. 38. See Watt v. People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403.

Offenses near boundary line between counties.—By statute in some States it is provided that where an offense is committed within a certain distance of the boundary line between counties it is within the jurisdiction of either county. v. Daily, 113 Iowa, 362, 85 N. W. 620; State v. Niers, 87 Iowa, 723, 54 N. W. 1076; State v. Pugsley, 75 Iowa, 742, 38 N. W. 498; Commonwealth v. Gillen, 2 Allen (Mass.), 502; State v. Masteller, 45 Minn. 128, 47 N. W. 541. Under a statute of this kind the grand jury of a county has jurisdiction over an offense committed in another county within the distance specified of the boundary line and in such a case an indictment found in the former county is sufficient if it shows jurisdiction in the grand jury finding it, it not being essential that the name of the city or town should be stated. So the keeping of a house of ill-fame is a local offense, and should be described, in an indictment, as committed in a particular town, and the prosecutor is confined in his proof, to the town stated, and cannot, as in other cases, prove an offense within the county.<sup>22</sup> In this connection generally it is declared in an early case in Maine that in this country, usually, in an indictment the place where an offense is alleged to have been committed, is a town named, which is within a county also named, where the court have jurisdiction; but it is not necessary that the town should be stated, if the place mentioned is equally specific. If the particular place named is shown to be within the county, over which the court have jurisdiction, it is sufficient.<sup>23</sup> But where the jurisdiction of the court

necessary to allege that the offense was committed in that county. People v. Davis, 56 N. Y. 9. But under such a statute it is not sufficient to allege that the offense was committed within the distance specified of the boundary line "as near as the grand jury knew and can state." State v. Daily, 113 Iowa, 362, 85 N. W. 620.

Where one is indicted for illegally marrying a woman, knowing her to be the wife of another man, if the offense is alleged to have been committed in a county other than that in which the indictment was found, it should be alleged that the defendant was apprehended in the latter county. Houser v. People, 46 Barb. (N. Y.) 33.

In an indictment for conspiracy the venue may be laid in the county where the agreement between the defendants was to be carried out. Kutch v. State, 32 Tex. Cr. 184, 22 S. W. 594, holding also that, under Tex. Code Cr. Proc., art. 221, there was no variance, though the proof showed the agreement to have been made in another county.

Indictment of a road overseer.—That the road was in a specified county need not be affirmatively alleged in an indictment, under Tex. Rev. Code, art. 409, of a road overseer for failing to keep a road in repair. Howell v. State (Tex. App.), 16 S. W. 533.

Proof is essential of the county in which the offense was committed. Ward v. State, — Ark. —, 90 S. W. 619. And unless it is shown that it was committed in the county in which the venue was laid the indictment will be quashed. Moody v. State, 7 Blackf. (Ind.) 424; Parrish v. State, 14 Md. 238.

Location of building in county.—Sufficiency of allegation as to, see State v. Jacobs, 75 Iowa, 247, 39 N. W. 293; Acton v. State, 80 Md. 547, 31 Atl. 419; Johnson v. State (Tex. Cr.), 21 S. W. 929.

22. State v. Nixon, 18 Vt. 70, 46 Am. Dec. 135.

**23**. State v. Roberts, 26 Me. 263. See, also, Ledbetter v. United States, 170 U. S. 606, 18 S. C. 774.

does not extend over the entire county an allegation that the offense was committed within the county is not sufficient.<sup>24</sup> And where an offense is statutory and can be committed only in a certain municipal division, which is less than the county within the jurisdiction of the court, the name or description of such division, and the fact that the offense was committed therein should be set forth in the indictment.<sup>25</sup>

§ 299. Offense indictable in different counties.—One who was charged with larceny could at common law be indicted and tried in any county into which he took the property, the principle upon which this rule was founded being that the possession by the thief of the property stolen constituted a larceny in every county into which he carried the goods because the legal possession was still in the true owner and every moment's continuance of the trespass and felony amounted in legal consideration to a new caption and asportation.<sup>26</sup> And in a case in New York it is said to have been the

Charging an offense to have been committed "at" a certain named city sufficiently alleges that it was committed "within" said city. Graham v. State, 1 Ark. 171. See Augustine v. State, 20 Tex. 450.

Where a place is unincorporated, but has nevertheless a name and limits known and recognized by the people of the county, it is sufficient to charge the commission of the offense at such place, stating the name by which it is so known, situated within the county of (stating the name of the county) aforesaid, where there is nothing to show that the prisoner would be embarrassed in the preparation of his defense for want of a more particular description. State v. Wagner, 61 Me. 178.

People v. Wong Wang, 92 Cal.
 277, 28 Pac. 270; McBride v. State,
 Humph. (Tenn.) 615.

25. Seifried v. Commonwealth, 101 Pa. St. 200.

26. State v. Brown, 8 Nev. 208. Judge Hawley further said: courts have uniformly held that a person stealing goods in one county and carrying them into other counties is considered as guilty of the crime and may be indicted and convicted in either county; because every act of the thief in the removal of the property, and keeping it from the possession of the owner, is, in contemplation of law, an offense," citing Haskins v. People, 16 N. Y. 348; People v. Smith, 4 Park. Co. R. (N. Y.) 255; State v. Douglas, 17 Me. 195; Commonwealth v. Cousins, 2 Leigh (Va.), 708; State v. Somerville, 21 Me. 19; State v. Underwood, 49 Me. 185; Morrissey v. People, 11 Mich. 329; State v. Seay, 3 Stew. (Ala.) 130; Aaron v. State, 39 Ala. 685; People v. Mellen, 40 Cal. 654.

settled law from an early period that where property is stolen in one county and carried by the thieves into another county they may be indicted in the latter county.<sup>27</sup> In such a case, however, an indictment found in the county to which the property was taken should allege the offense to have been committed in such county or that the bringing of the property into such county was felonious.<sup>28</sup>

In an early case in New York it is declared in this connection that in an indictment for simple larceny it is sufficient to allege the taking to have been in the county where the indictment is found but that an indictment for burglary, in a county other than that where the burglarious entry was made must set out the facts especially to bring it within the statute permitting such an indictment.<sup>28a</sup> Again though it is provided by statute that where an offense is commenced in one county and terminated in another, an indictment will lie in either county, yet it has been decided that an information for obtaining property under false pretenses which by reason of its uncertainty does not make it appear that the property was obtained in the county where the pretenses were made, nor elsewhere in the State, does not show that a court of the county where the pretenses are alleged to have been made, has jurisdiction of the offense.<sup>28b</sup>

In an indictment for larceny the venue may be laid in any county in which the thief was possessed of the stolen goods. State v. Lillard, 59 Iowa, 479, 13 N. W. 637. See People v. Staples, 91 Cal. 23, 27 Pac. 523, holding that an indictment charging that the defendant, after stealing a watch in Arizona, brought it into a certain named county in California, sufficiently charged that the larceny was within the jurisdiction of the court of that county under Cal. Pen. Code, §§ 497, 789. Mack v. People, 82 N. Y. 235.

See also § 64 herein.

27. Haskins v. People, 16 N. Y. 344, citing 3 Inst. 113; 1 Hale's P. C. 507; People v. Gardner, 2 Johns. (N.

Y.) 477. See Mack v. People, 82 N.Y. 235.

28. State v. Brown, 8 Nev. 208.

Under a statute permitting the prosecution in one county of an offense committed in another county, it is proper to allege that the indictment was presented by the grand jury of the county where the prosecution was instituted and to alllege the county in which the offense was actually committed. Mischer v. State, 41 Tex. Cr. 212, 53 S. W. 227, 96 Am. St. Rep. 780. See People v. Scott, 74 Cal. 94, 15 Pac. 384.

28a. Haskins v. People, 16 N. Y. 344.

28b. Connor v. State, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126.

## §§ 300, 301 CHARGING THE OFFENSE—PARTICULAR AVERMENTS.

§ 300. Where new county created after commission of offense includes place where committed.—Where after the offense has been committed and before an indictment is found a new county is created which includes the place where the crime was committed and provision is made by law for the holding of court in such county for offenses committed within its limits an indictment may be found in the new county alleging the commission of the offense therein.29 In this connection it is said in a case in Maine: "When a new county has been incorporated, and provision made for holding terms of the Supreme Court therein, such court will take cognizance of all crimes and offenses committed within the territorial limits of such new county, which are not then pending in or returnable to other courts, which fall within its general jurisdiction, whether such offenses were committed before or after the act of incorporation. Crimes are committed against the peace of the State and not against the peace of any particular county in the State. Territorial limits are assigned for the jurisdiction of particular courts to facilitate the despatch of judicial business and for the safety and convenience of the citizens."30

§ 301. Reference to venue already laid — Use of words "then and there" — City, county, or state "aforesaid."—In stating the place it is not necessary that in every case there should be a repetition by name of the city, county or state, but where the venue has previously been distinctly alleged in an indictment or in the margin the place may be sufficiently charged by a distinct reference thereto.<sup>31</sup> In such a case the reference may be made sufficient by the use of the words "then and there;" or by the use of the

29. McElroy v. State, 13 Ark. 708; State v. Jones, 9 N. J. L. 357. Compare Jordan v. State, 22 Ga. 545.

30. State v. Jackson, 39 Me. 291. Per RICE, J.

31. Indiana.—State v. Alsop, 4 Ind. 141.

Maryland.—Philadelphia, etc., R. R. Co. v. State, 20 Md. 157; Wedge v. State, 12 Md. 232.

Massachusetts.—Commonwealthv. Edwards, 4 Gray, 1.

Missouri.—State v. Ames, 10 Mo. 743; State v. DeLay, 30 Mo. App. 357.

Tennessee.—Barnes v. State, 5
Yerg. 186; Sanderlin v. State, 2
Humph. 315.

32. Illinois.—See Palmer v. People, 138 Ill. 356, 28 N. E. 130.

Indiana.—Davidson v. State, 135

words city, county or state followed by the word "aforesaid." And where the name of the city, county or state are alleged the place of the offense has been held to be sufficiently stated where

Ind. 254, 34 N. E. 972; State v. Slocum, 8 Blackf. 315.

**Iowa.**—State v. Salts, 77 Iowa, 193, 39 N. W. 167, 41 N. W. 620; State v. Reid, 20 Iowa, 413.

Louisiana.—See State v. Capers, 6 La. Ann. 268.

Maine.—State v. Roberts, 26 Me. 263.

Massachusetts.—Commonwealthv. v. McKenney, 14 Gray, 1; Jeffries v. Commonwealth, 12 Allen, 145.

New Hampshire.—State v. Cotton, 24 N. H. 143.

New York.—Crichton v. People, 1 Abb. Dec. 467, 6 Park. Cr. R. 363.

North Carolina.—State v. Bell, 25 N. C. 506.

**South Carolina.**—State v. Blakeney, 33 S. C. 117, 11 S. E. 637.

Texas.—Strickland v. State, 7 Tex. App. 34.

Washington.—State v. Meyers, 9 Wash. 8, 36 Pac. 1051.

**Wisconsin.**—State v. S. A. L., 77 Wis. 467, 46 N. W. 498.

The county in which the deceased died is sufficiently alleged in an indictment for murder where it is charged that a mortal wound was inflicted upon the body of the deceased at a specified county on a certain day "of which mortal wound he then and there died." Davidson v. State, 135 Ind. 254, 34 N. E. 972.

The location of a building, in an indictment for arson, is sufficiently stated as being in the county designated where it is alleged that defendant in a county named did "then and there" set fire to a certain building. State v. Meyers, 9 Wash. 8, 36 Pac. 1051.

33. Alabama.—Reeves v. State, 20 Ala. 33, "county aforesaid."

Ark. 321, "county and State aforesaid."

California.—People v. Baker, 100 Cal. 188, 34 Pac. 649, "county and State aforesaid."

District of Columbia.—United States v. Schneider, 21 Wash. L. Rep. 45, "county and district aforesaid."

Georgia.—Eaves v. State, 113 Ga. 749, 39 S. E. 318, "county aforesaid."

Indiana.—Haase v. State, 8 Ind. App. 488, 36 N. E. 54, "State aforesaid."

Iowa.—State v. Lillard, 59 Iowa, 479, 13 N. W. 637, "county aforesaid."

Kansas.—State v. Muntz, 3 Kan. 383, "county aforesaid."

Louisiana.—State v. Crittenden, 38 La. Ann. 448, "State, parish and district aforesaid."

Maine.—State v. Conley, 39 Me. 78, "county aforesaid."

Nebraska.—Dunn v. State, 58 Neb. 807, 79 N. W. 719, "county and State aforesaid;" Bartley v. State, 53 Neb. 310, 73 N. W. 744, "county aforesaid."

New Jersey.—Haase v. State, 53 N. J. L. 34, 20 Atl. 751, "city and county aforesaid."

South Carolina.-State v. Ass-

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the words "within the judicial district of said court" are used.<sup>34</sup> And where the name of the county is mentioned in the margin of the indictment, and it is stated that the dwelling house, in which the forcible trespass is alleged to have been committed was "there situate and being" it is decided that this must refer to the county mentioned in the margin.<sup>35</sup> By statute in some States it is provided that the venue laid in the margin shall be taken to be the venue of all the facts stated in the body of the indictment.<sup>36</sup>

§ 302. Same subject — Where different counties have been named.—Where two counties which are in different jurisdictions have been named in an indictment a subsequent statement that the offense was "then and there" committed or committed in the "county aforesaid" does not sufficiently set forth the place of the commission of the offense and will be regarded as defective.<sup>37</sup> So in an early case in Virginia it is decided that where the indictment in the caption names one county and in the body of it speaks of the defendant as of another county, the charging of the offense to have been committed in the county aforesaid, is error, it not being alleged with sufficient certainty that the offense was committed in . the county in which the indictment was found.38 So in the case of an information against one for obtaining property under false pretenses it has been decided that the word "there" in the expression "then and there" in the averment as to the obtaining the property is, where two jurisdictions have already been mentioned,

man, 46 S. C. 554, 24 S. E. 673, "county and State aforesaid."

**Tennessee.** — State v. Shull, 3 Head, 42, "county aforesaid."

Texas.—Boggs v. State (Tex. Cr.), 25 S. W. 770, "county aforesaid."

34. Commonwealth v. Clancy, 154 Mass. 128, 27 N. E. 1001.

35. State v. Tolever, 27 N. C. 452.

36. State v. Brown, 159 Mo. 646, 60 S. W. 1064; Rev. St. 1899, § 2527; State v. Fraker, 148 Mo. 143, 49 S. W. 1017; Rev. St. 1889, § 4107.

37. Connor v. State, 29 Fla. 455, 10 So. 891; Commonwealth v. Wheeler, 162 Mass. 429, 38 N. E. 1115; State v. McCracken, 20 Mo. 411. See State v. Jackson, 39 Me. 291.

Where two or more venues are laid in an indictment it then becomes necessary for the pleader, by apt averments, to distinguish between the different venues. State v. Fraker, 148 Mo. 143, 157, 49 S. W. 1017.

38. Bell v. Commonwealth, 8 Gratt. (Va.) 600.

entirely insufficient to show where the defendants obtained the property and that the count being entirely uncertain as to the venue or jurisdiction in this respect, the information should be quashed.<sup>39</sup> And in an early case in Maine it is decided that an indictment in which two distinct times and places have been mentioned where the substantive offense has been committed, and in which reference is afterwards made to time and place by the words "then and there" is defective but that when one of the places previously mentioned has reference only to the residence of a person named therein it is unexceptionable.<sup>40</sup>

§ 303. Offenses committed on board vessels.—An indictment alleging that an offense was committed on board of an American vessel, on the high seas, within the jurisdiction of the court and the admiralty and maritime jurisdiction of the United States and not within the jurisdiction of any particular State sufficiently shows the location of the offense.41 And an indictment under a statute providing that "when an offense is committed within this State, on board of a vessel navigating a river, bay, or slough, or lying therein, in the prosecution of her voyage, the jurisdiction shall be in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage shall terminate" should set forth therein those facts which give the extra territorial jurisdiction under the statute. In such a case it is said: "The extra territorial jurisdiction thus conferred upon the courts of the various counties situated upon the navigable waters of the State, is special in its character, and in derogation of the common law rule upon this subject; and whenever it is invoked, the facts and circumstances should be set out fully in the indictment. In this respect, the court may be considered as exercising a special and

Offense upon a vessel in Lake Huron.—An indictment therefor should show that the offense was not within the jurisdiction of the State court, in order to give jurisdiction to a Federal court. United States v. Paterson, 64 Fed. 145.

<sup>39.</sup> Connor v. State, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126.

<sup>40.</sup> State v. Jackson, 39 Me. 291, citing Jane v. State, 3 Mo. 61. See Commonwealth v. Williams, 149 Pa. St. 54, 24 Atl. 158.

**<sup>41</sup>**. St. Clair v. United States, 154 U. S. 134, 38 L. Ed. 936, 14 Sup. Ct. 1002.

§§ 304, 305 Charging the Offense—Particular Averments.

limited jurisdiction, and the facts which give jurisdiction must be clearly alleged and satisfactorily proved."42

- § 304. Indictment in State court need not negative jurisdiction of Federal court.—Where the Federal government has jurisdiction over a portion of the territory within a county it is not necessary in an indictment or information at the instance of the State which alleges the commission of the offense within the county to negative the jurisdiction of the Federal court by alleging that the crime was not committed on the territory subject to the jurisdiction of the latter courts. So in another case in which this question arose the court said: "The jurisdiction of the State over persons within its borders being general, and that of the United States exceptional over places purchased for specific uses of the general government, it is not necessary in an indictment in the State courts to negative the jurisdiction of the Federal courts; but if the latter have exclusive jurisdiction over the offense, it is a matter of defense simply."
- § 305. Omission to state place Power to amend.—An omission in an indictment to state the place where the offense was committed is a defect in matter of substance which is fatal and which can not be cured by amendment. In this connection it has been said: "There can be no difference of opinion as to what is meant by the expression 'indictment of a grand jury.' It manifestly means a written accusation made and presented by the inquisition known as a grand jury. But if, after being presented to the court,
- 42. People v. Dougherty, 7 Cal. 395. Per Murray, J., who further said: "There is great reason for this rule, for if these allegations can be dispensed with, then the defendant might be indicted, tried and convicted in every county through which a vessel might pass in making her voyage, and one conviction or acquittal would be no bar to another prosecution, as it would be impossible to determine

that they were for one and the same offense."

- **43**. State v. Tully, 31 Mont. 365, 78 Pac. 760.
- **44.** State v. Carlson, 39 Oreg. 15, 62 Pac. 1016. Per Moore, J., citing People v. Collins, 105 Cal. 504, 39 Pac. 16.
- 45. State v. Chamberlain, 6 Nev. 257; Collins v. State, 6 Tex. App. 647.

an indictment so found be in any particular materially modified or altered; if anything of substance be added to or taken therefrom by the court, it cannot with any degree of propriety be denominated an indictment of a grand jury. If, as in this case, something material be added to it, the portion so added would not be a finding or accusation by the jury, but by the court; nor if modified in any essential matter would the portion so modified be their work. If the courts have the power to add to or take from anything material in an indictment, where is the limit to that power. . . . Clearly no indictment upon which a person can be legally tried can be found except by a grand jury, and the courts have no more authority to add any material charge, accusation or allegation to it than they have to find the bill in the first instance."46 And though by statute the power is conferred upon the court of amending an indictment upon demurrer yet where the indictment as returned by the grand jury does not show that the crime was committed within the jurisdiction of the court, the statute will not be construed as giving the court power to amend it in this respect.<sup>47</sup> But where an information charging the unlawful sale of intoxicating liquors described the building in which they were sold by name but the description of the lots upon which the building stood in the city was incorrect and it appeared that there was a building known by the name given it was held that the court committed no error in permitting an amendment of the information by striking out the words describing the location of the building by lots.48

§ 306. Defects in stating place cured by verdict.—An imperfection in describing the place where an offense was committed may in many cases be a good ground for a motion to quash or demurrer where it would not be available on a motion in arrest of

<sup>46.</sup> State v. Chamberlain, 6 Nev. 257, 260. Per Lewis, J.

<sup>47.</sup> State v. Armstrong, 4 Minn. 335, wherein it was said: "To supply an averment by amendment which is necessary to perfect the charge, is in effect to 'hold the defendant to

answer for a criminal offense' in a manner other than on the indictment of a grand jury,' and is, in a high degree, unjustly prejudicial to his rights as a citizen." Per FLANDRAU, J.

<sup>48.</sup> State v. Sterns, 28 Kan. 154.

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judgment, the defect being held to be cured by the verdict. 49 It has been declared by the United States Supreme Court that "while in this country it is usual to state the town as well as the county, it has not generally been deemed necessary to do so, and most of the authorities assume that an allegation is sufficient after verdict which shows it to have been done within the jurisdiction of the court. 50 Indeed an indictment charging an offense to have been committed in one town is supported by proof that it was committed in a different town within the same county, and within the jurisdiction of the court." 51

§ 307. Statutes dispensing with necessity of averring place.—
In many States the necessity of expressly stating the place where the offense was committed has been dispensed with by statutory or code provisions. In some jurisdictions in which it is so provided it is made a matter of proof only upon the trial in order to show that the court has jurisdiction of the offense.<sup>52</sup> By statute in Arkansas it was provided that where in an indictment there is no averment of the place where the offense was committed it will be regarded as charging the offense to have been committed within the jurisdiction of the court in which the grand jury was impanelled.<sup>53</sup> By the Missouri statute it was provided that it is not necessary to charge the venue in the body of an indictment but that the county which is named in the margin is to be considered as the venue of the facts which are stated in the body.<sup>54</sup> And

**<sup>49</sup>**. Nichols v. State, 127 Ind. 406, 26 N. E. 839.

<sup>50.</sup> Citing Heikes v. Commonwealth, 26 Pa. St. 513; United States v. Wilson, Baldw. 78; Carlisle v. State, 32 Ind. 55; State v. Goode, 24 Mo. 361; State v. Smith, 5 Harr. (Md.) 490; Barnes v. State, 4 Port. (Ala.) 186; Wingard v. State, 13 Ga. 396; State v. Warner, 4 Ind. 604.

<sup>51.</sup> Ledbetter v. United States, 170 U. S. 606, 18 S. C. 774. Per Mr. Justice Brown, citing Commonwealth v. Tolliver, 8 Gray (Mass.), 386;

Commonwealth v. Creed, 8 Gray (Mass.), 387; Carlisle v. Indiana, 32 Ind. 55; Commonwealth v. Lavery, 101 Mass. 207; People v. Honeyman, 3 Den. (N. Y.) 121.

**<sup>52.</sup>** Toole v. State, 89 Ala. 131, 8 So. 95; Ala. Code 1886, § 4374; State v. Shull, 3 Head (Tenn.), 42; Tenn. Code, § 5025.

**<sup>53.</sup>** Brassfield v. State, 55 Ark. 556, 18 S. W. 1040; Mansf. Ark. Dig., **\$** 2113.

<sup>54.</sup> State v. Brown, 159 Mo. 646,

under the Code in Iowa it has been declared that technical exactness of language is not required and that it is sufficient if it can be understood from the indictment that the offense was committed within the jurisdiction of the court.<sup>55</sup> But under a code provision in New York making it a requisite to a valid indictment that "it can be understood therefrom that the crime was committed at some place within the jurisdiction of the court," it has been decided that if the charging part of the indictment does not specify any place where the alleged crime was committed the indictment is defective and a demurrer thereto is properly sustained.<sup>56</sup>

§ 308. Matters of which court will take judicial notice.—Acts prescribing the limits of counties and towns are public acts of which the court will judicially take notice.<sup>57</sup> So stating an offense to have been committed in a certain town without adding the name

60 S. W. 1064; Mo. Rev. St. 1899, § 2527.

55. State v. Jacobs, 75 Iowa, 247, 39 N. E. 293.

People v. Horton, 62 Hun (N.
 Y.) 610, 17 N. Y. Supp. 1.

People v. Breese, 7 Cow. (N. Y.) 429; State v. Jordan, 12 Tex.
 See § 276 herein.

"Statutes prescribing the boundaries of a territory and division into judicial districts are public acts which the courts are bound to know, and of which they will take judicial notice. The limits of such judicial divisions are, therefore, of judicial cognizance. And so with regard to leading places and the geographical features of the land within such limits, as also with regard to the location and position of leading cities, villages and public places therein. . . A court will, likewise, take judicial notice of Indian Reservations, and of leading public proclamations affecting matters relative to its jurisdiction. And this embraces executive decrees, orders and ordinances of State, and when these are issued in authentic public documents they need not be proved." United States v. Beebe, 2 Dak. 292, 11 N. W. 505. Per Shannon, J.

In England courts cannot presume, as in this country, that a certain parish or town is in the county named in the indictment, because the boundaries of such are not defined by public laws. State v. Roberts, 26 Me. 263, 269. Per Tenney, J., citing Commonwealth v. Springfield, 7 Mass. 9.

A military reservation is an act of the president, under authority of law, withdrawing so many acres of the public domain from the immediate administration of the commissioner of the public lands, that is, from sale at public auction, and by pre-emption or general private entry, and appropriating it, for the time being, to some special use of the government, and the court will take judicial notice

of the county in which it is situated is held sufficient to confer jurisdiction, as the court takes judicial cognizance of the towns in a state and that they are in the counties to which they belong by law.<sup>58</sup> And where an indictment stated the county as Herkimer both in the margin and in the first count and then described the defendants as of Utica, in the county of Oneida, and then laid the offense as committed in the town of Franklin in said county and Franklin was in fact in Herkimer county, it was held that this was in effect as laying the offense in the latter county, Franklin being a town created by public statute.<sup>59</sup> And likewhise where two counties are in the same judicial district it is not necessary to aver this fact in an indictment in one county for an offense committed in the other.<sup>60</sup> And where an indictment states the town and county in which an offense was committed it will be regarded as sufficient though it does not give the name of the state.<sup>61</sup>

§ 309. Charging time of offense — General rule.—The indictment must be sufficiently certain in charging the offense and without setting forth some time as that of its alleged commission there cannot be said to be the certainty required. At common law it was essential that time should be stated by laying a day and year certain and an indictment which did not do this was subject to demurrer and this may be said to be the general rule at the present time except so far as it may be modified by statute. So in a case

of the records of the executive department in reference thereto. State v. Tully, 31 Mont. 365, 78 Pac. 760.

58. Vanderwerker v. People, 5 Wend. (N. Y.) 530; Hite v. State, 9 Yerg. (Tenn.) 357.

An indictment found in the Louisville City Court for an offense of which that court has jurisdiction when committed within the limits of the city, need not state the county in which the offense was committed, it being sufficient to charge that it was committed in the city of Louisville. Pusey v. Commonwealth, 8 Ky. Law Rept. 538.

- People v. Breese, 7 Cow. (N. Y.) 429. Compare Commonwealth v. Wheeler, 162 Mass. 429, 38 N. E. 1115.
- **60**. Mischer v. State, 41 Tex. Cr. 212, 53 S. W. 627.
- 61. State v. Wentworth, 37 N. H. 196. See, also, Covey v. State, 4 Port. (Ala.) 186; People v. Lafuents, 6 Cal. 202; Satterwhite v. State, 6 Tex. App. 609; State v. Cook, 38 Vt. 437.
  - 62. Allen v. State, 13 Mo. 307.
- 63. United States. United States v. Winslow, 3 Sawy. 337.

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in Texas it is said that it is the universal practice, in describing an offense to state a day on which it was committed though it may not generally be necessary to prove that it took place on that particular day and the court declared that this rule had been so well and so long established that it did not feel authorized to sanction a de-

Ala. 526; State v. Beckwith, 1 Stew. 318.

Maine.—State v. Wagner, 61 Me. 178; State v. Hanson, 39 Me. 337; State v. Baker, 34 Me. 52.

Massachusetts.—Commonwealthv. Gardner, 7 Gray, 494; Commonwealthv. Dutton, 5 Gray, 89.

Missouri.—State v. Welker, 14 Mo. 398; Erwen v. State, 13 Mo. 306; Allen v. State, 13 Mo. 307.

New Jersey.—Oliver v. State, 45 N. J. L. 272.

North Carolina.—State v. Roach, 2 Hayw. 352.

Pennsylvania.—Jacobs v. Commonwealth, 5 S. & R. 315; Commonwealth v. Nailor, 29 Pa. Super. Ct. 275.

South Carolina.—State v. Brown, 24 S. C. 224.

**Texas.**—State v. Eubanks, 41 Tex. 291; Barnes v. State, 42 Tex. Cr. 297, 59 S. W. 882.

Vermont.—State v. La Bore, 26 Vt. 765; State v. G. S., 1 Tyler, 295, 4 Am. Dec. 724.

"Time and place must accompany every material allegation in the indictment, though it is not necessary in all cases to prove the offense on the day laid if it is before bill found." State v. Coleman, 8 S. C. 237, 243. Per Moses, J.

"The time laid should be the day of the month and year upon which the act is supposed to have been committed. A day certain must be stated, and this at present is always the day of the month, although naming it as a feast day or 'the octave of the Holy Trinity,' or the like seems to be sufficient." Arch. Cr. Pl. (1st ed.), p. 12.

"Every indictment must allege a day and year on which the offense was committed." 1 Bish. on Cr. Proc. (1st ed.), § 239.

"It is in general requisite to state that the defendant committed the offense for which he was indicted on a specific day and year." 1 Chitty Cr. Law, p. 217.

Charging the commission of an offense "on the third day of June instant" is insufficient, although the complaint purports to have been sworn to "on the fourth day of June A. D. 1855." Commonwealth v. Hulton, 5 Gray (Mass.), 89.

Where time is laid after a scilicet, if it is repugnant to the time stated in a former part of the indictment, the scilicet may be rejected as surplusage. State v. Haney, 1 Hawks (N. C.), 460.

The day and year may be expressed in figures and need not be expressed in words at length.

Alabama.—State v. Raiford, 7 Port. 101.

Indiana.—Hizer v. State, 12 Ind. 330; Hampton v. State, 8 Ind. 336.

Iowa.—State v. Seamons, 1 Greene, 418.

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parture from it.<sup>64</sup> And in a somewhat recent case in Georgia it is decided that an indictment which charges the commission of an offense in a certain year, without naming either the day or month upon which it was committed is defective and upon special demurrer thereto before arraignment should be quashed.<sup>65</sup> And in a case in Maine it is also decided that an omission to state the time when an alleged offense was committed is fatal even though the omission was undoubtedly accidental.<sup>66</sup>

§ 310. Precise time not essential.—Although it is said that the insertion of a definite date, or a date as definite as could be ascertained by the pleader, would be a better practice, and would accord fairer treatment to the defendant, <sup>67</sup> yet it is not necessary that the precise time of the commission of the offense be stated in an indictment, it being sufficient if it is shown to have been within the statute of limitations except where time is an indispensable ingredient of the offense. <sup>68</sup> So a defendant may be convicted upon

Louisiana.—State v. Egan, 10 La. Ann. 698.

Maine.—State v. Reed, 35 Me. 489. Massachusetts.—Commonwealth v. Smith, 153 Mass. 97, 26 N. E. 436.

Vermont.—State v. Hodgeden, 3 Vt. 481.

Virginia. — Lazier v. Commonwealth, 10 Gratt. 708; Cody v. Commonwealth, 10 Gratt. 776.

But see Finch v. State, 6 Blackf. (Ind.) 533; State v. Voshall, 4 Ind. 589; Berrian v. State, 22 N. J. L. 9. See § 194 herein.

An indictment need not aver the year to be "the year of our Lord."—Hall v. State, 3 Ga. 18; State v. Bartlett, 47 Me. 388; Commonwealth v. Doran, 14 Gray (Mass.), 37; Commonwealth v. Sullivan, 14 Gray (Mass.), 97; State v. Lane, 4 Ired. L. (N. C.) 113. Compare Whitesides v. People, 1 Ill. 4; Engleman v. State, 2 Ind. 91. Use of abbreviations in stating date.—See § 195 herein.

64. State v. Eubanks, 41 Tex. 291. Per ROBERTS, J.

**65**. Braddy v. State, 102 Ga. 568, 27 S. E. 670.

66. State v. Withee, 87 Me. 462, 32 Atl. 1013, citing State v. Beaton, 79 Me. 314, 9 Atl. 728; State v. O'Donnell, 81 Me. 271, 17 Atl. 66; State v. Dodge, 81 Me. 391, 17 Atl. 313; State v. Fenlason, 79 Me. 117, 8 Atl. 459; State v. Baker, 34 Me. 52.

67. State v. Gottfreedson, 24 Wash. 398, 64 Pac. 523. See Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774.

68. Alabama.—Shelton v. State, 1 Stew. & P. 208.

**Arkansas.**—Marquardt v. State, 52 Ark. 269, 12 S. W. 562.

California.—People v. Miller, 12 Cal. 291.

proof of the offense at any other time, whether before or after the day laid, so that it were before the time when the indictment was preferred.69 But it has been decided when any time stated in an indictment is to be proved by matter of record, a variance will be fatal, and that in an indictment for perjury the day in which the perjury was committed must be truly laid. 70 And in determining

Georgia.—Conner v. State, 25 Ga. 515, 71 Am. Dec. 184.

Indiana.—Fleming v. State, 136 Ind. 149, 36 N. E. 154; Myers v. State, 121 Ind. 15, 22 N. E. 781; Hubbard v. State, 7 Ind. 160; State v. Rust, 8 Blackf. 195.

Iowa.-State v. Freeman, 8 Iowa, 428.

Kansas.-State v. Barnett, 3 Kan. 250, 87 Am. Dec. 471.

Kentucky .-- Commonwealth v. Alfred, 4 Dana, 496.

Michigan.—People v. Jenness, 5 Mich. 305.

Mississippi.—McCarty v. State, 37 Miss. 411; Miller v. State, 33 Miss. 356.

Missouri.-State v. Barr, 30 Mo. App. 498.

New York .- People v. Jackson, 111 N. Y. 362, 19 N. E. 54, 19 N. Y. St. R. 506.

North Carolina.—State v. Peters, 107 N. C. 876, 12 S. E. 74; State v. Swaim, 97 N. C. 462, 2 S. E. 68; State v. Sam, 2 Dev. L. 567.

Rhode Island.—Kenney v. State, 5 R. I. 385.

Virginia.—Arrington v. Commonwealth, 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242.

Washington.—State v. Gottfreedson, 24 Wash. 398, 64 Pac. 523.

Leaving the day of the month blank in charging the offense does not render the indictment defective. United States v. Conrad, 59 Fed. 458; State v. Effinger, 44 Mo. App. 81; Cecil v. Territory (Okla. 1905), 82 Pac. 654; State v. Knight, 29 W. Va. 340, 1 S. E. 569. But see United States v. Law, 50 Fed. 915.

69. State v. Pratt, 14 N. H. 456.

70. Rhodes v. Commonwealth, 78 Va. 692, 696. Per LACY, J., citing United States v. McNeal, 1 Gall. 387; United States v. Bournan, 2 Wash. C. C. 328; 2 Whart. Cr. Law, 599. But see State v. Perry, 117 Iowa, 463, 91 N. W. 765, holding that in an indictment for perjury an allegation that the crime was committed "on or about" a specified date is sufficient as to time. The court said in this case: "If, when a copy of the record or the other paper containing the oath alleged to be false is set out in haec verba in the indictment, and the alleged originals are produced, bearing a different date, the variance is held fatal on the ground that the record or paper offered is not identified as the one intended. If, however, the charge is not based on a record or other writing under oath, and the statement asserted to be false might have been made on either the date alleged or that proven, and would have constituted perjury, if taken at either time. then the variance is regarded by the weight of authority as wholly immaterial." Per LADD, J., citing Mat-

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the sufficiency of an indictment the date alleged is held to become material and the court will consider that as the true one.<sup>71</sup>

§ 311. When variance between time alleged and proof not material.—The general rule is that except when time enters into the character of the offense proof of the precise time specified in an indictment or presentment is not indispensable to conviction. Though the evidence may establish the fact that the date of the offense was other than that alleged, yet the variance is not fatal and a conviction will be supported where it appears that the time of the offense was within the period prescribed by the statute of limitations and prior to the finding of the indictment.<sup>72</sup> So it is

thews v. United States, 161 U. S. 500, 16 Sup. Ct. 640, 40 L. Ed. 786; Keator v. People, 32 Mich. 484; State v. Fenlason, 79 Me. 117, 8 Atl. 459; Commonwealth v. Soper, 133 Mass. 393; Dill v. People, 19 Colo. 469, 36 Pac. 229, 41 Am. St. Rep. 454; State v. Lewis, 93 N. C. 581; Lucas v. State, 27 Tex. App. 322, 11 S. W. 443; Commonwealth v. Davis, 94 Ky. 612, 23 S. W. 218.

**71**. Dreyer v. People, 176 Ill. 590, 52 N. E. 372.

72. United States.—Johnson v. United States, 3 McLean, 89.

Alabama.—McDade v. State, 20 Ala. 81.

Arkansas.—Medlock v. State, 18 Ark. 363.

**Florida.**—Chandler v. State, 25 Fla. 728, 6 So. 768.

Georgia.—Clarke v. State, 90 Ga. 448, 16 S. E. 96; Dacy v. State, 17 Ga. 439; Wingard v. State, 13 Ga. 396.

Illinois.—Dreyer v. People, 176 Ill. 590, 52 N. E. 372.

Iowa.—State v. Blanchard, 74 Iowa, 628, 38 N. W. 519; State v. McClintic, 73 Iowa, 603, 35 N. W. 696.

Kansas.—State v. Gill, 63 Kan. 382, 65 Pac. 682.

**Kentucky.**—Commonwealth v. Alfred, 4 Dana, 496; Faustre v. Commonwealth, 13 Ky. Law Rep. 347, 17 S. W. 189.

Louisiana.—State v. Walters, 16 La. Ann. 400.

Massachusetts.—Benson v. Commonwealth, 158 Mass. 164, 33 N. E. 384; Commonwealth v. Harrington, 3 Pick. 26; Commonwealth v. Braynard, Thach. Cr. Cas. 146.

Mississippi.—Oliver v. State, 5 How. 14.

Missouri.—State v. Kolb, 48 Mo. App. 269.

New Jersey.—State v. Lyon, 45 N. J. L. 272.

New York.—People v. Jackson, 111 N. Y. 362, 19 N. E. 54, 19 N. Y. St. R. 506; People v. Shannon, 87 App. Div. 32, 83 N. Y. Supp. 1061, 17 N. Y. Cr. R. 532; People v. Stocking, 50 Barb. 573, 6 Park Cr. R. 263; People v. Van Santvoord, 9 Cow. 655; said by the United States Supreme Court: "Good pleading undoubtedly requires an allegation that the offense was committed on a particular day, month and year, but it does not necessarily follow that the omission to state a particular day is fatal upon a motion in arrest of judgment, neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient." And it has

People v. McGuinness, 15 N. Y. Supp. 230, 39 N. Y. St. R. 533.

North Carolina.—State v. Newsom, 2 Jones L. 173.

Pennsylvania. — Commonwealth v. Nailor, 29 Pa. Super. Ct. 271; Commonwealth v. Powell, 23 Pa. Super. Ct. 370.

**South Carolina.**—State v. Anderson, 59 S. C. 229, 37 S. E. 820; State v. Dawkins, 32 S. C. 17, 10 S. E. 772.

Tennessee.—State v. Eskridge, 1 Swan, 413.

**Vermont.**—State v. Willett, 78 Vt. 157 62 Atl. 48.

Virginia.—Rhodes v. Commonwealth, 78 Va. 692.

"The general rule requires the pleader to state some time when the offense was committed, within the period prescribed as a bar to the prosecution; but it is too well settled now to be questioned that where the time is averred under a videlicet the prosecutor is not held to proof of it as laid, but may prove that the offense was committed at any time before the finding of the indictment, and within the period prescribed as a bar." McDade v. State, 20 Ala. 81, 82. Per Chilton, J.

It is not necessary to prove that

the offense was committed at the time averred. It is sufficient to prove that the offense charged was committed at any time within the period fixed by the statute of limitations. Armstrong v. State, 145 Ind. 609, 43 N. E. 866.

This principle has been applied to indictments for such offenses as an attempt to poison (Benson v. Commonwealth, 158 Mass. 164, 33 N. E. 384); bigamy (Faustre v. Commonwealth, 13 Ky. Law Rep. 347, 17 S. W. 189); burglary (State v. Dawkins, 32 S. C. 17, 10 S. E. 772); forgery (State v. Blanchard, 74 Iowa, 628, 38 N. W. 519); larceny (State v. Anderson, 59 S. C. 229, 37 S. E. 820); seduction (State v. McClintic, 73 Iowa, 663, 35 N. W. 696); and unlawful sale of liquors (State v. Kolb, 48 Mo. App. 369).

In an indictment for murder a variance of a day between the time alleged in the indictment and that shown by the proof is immaterial. People v. Jackson, 111 N. Y. 362, 19 N. E. 54, 19 N. Y. St. Rep. 506.

73. Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774. Per Mr. Justice Brown, citing Armstrong v. State, 145 Ind. 609; Gratz v. Commonwealth, 96 Ky. 162; United

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been said by the United States Circuit Court of Appeals that "It is a well settled rule of criminal practice that the date of an alleged offense, as stated in an indictment, is not binding on the United States, and is only material in reference to the bar of limitations and to show that the offense was committed anterior to the presentment of the indictment. It is the practice to name in the indictment a date on which the offense was committed 'but in the absence of a special reason rendering it important, this allegation is mere form, and the time proved need not be the same as laid.'"<sup>74</sup> And it has been said by the United States Supreme Court that the date named in an indictment for the commission of the crime of murder is not an essential averment and that proof that the crime was committed days before or days after the date named is no variance.<sup>75</sup>

§ 312. Where time is an essential element.—Where time is an essential element of an offense the omission to state it constitutes a fatal defect which is not cured by the verdict. So when time is of the essence of the offense, as where the statute prohibits

States v. Conrad, 59 Fed. 458; Fleming v. State, 136 Ind. 149; State v. McCarthy, 44 La. Ann. 323.

74. Hume v. United States, 118 Fed. 689, 696, 55 C. C. A. 407. Per SHELBY, J., citing 1 Bish. New Cr. Prac., § 386.

**75**. Hardy v. United States, 186 U. S. 224, 225, 22 Sup. Ct. 889. Per Brewer, J.

76. Lewis v. State, 16 Conn. 32, so holding where an information for burglary did not charge the crime to have been committed in the night season, and contained no allegation of the hour when the offense was committed or from which it appeared to have been committed in the night season.

In an indictment for false

tokens and swindling, the procuring the goods is a material fact and it should appear by the indictment when they were procured. State v. Bacon, 7 Vt. 219.

Necessity of averring time of day in indictment for burglary, see State v. Anselm, 43 La. Ann. 195, 8 So. 583; State v. Hutchinson, 111 Mo. 257, 20 S. W. 34; Guynes v. State, 25 Tex. App. 584, 8 S. W. 667; Sampson v. State (Tex. Cr. App.), 20 S. W. 708; Shelton v. Commonwealth, 89 Va. 450, 16 S. E. 355.

The particular hour of the night need not be alleged, in an indictment for an offense committed in the night time. Commonwealth v. Williams, 2 Cush. (Mass.) 582, decided under Mass. St. 1847. ch. 13.

the doing of an act on certain days or dates, the indictment should show that the alleged violation of law was of that day or date.<sup>77</sup>

§ 313. Use of words "on or about" in stating time - Generally.—At common law it was necessary to state an exact day as the time of the commission of the offense and the omission to do so was fatal. Therefore an allegation that the offense was committed "on or about" a certain day does not sufficiently state the time and an indictment in which it is so alleged is, at common law, insufficient.<sup>78</sup> And it may be stated generally that where the time of the commission of an offense is an essential ingredient thereof it is essential that time should be averred, and the use of the words "on or about" renders an indictment defective. So where time is of the essence of the offense, as where the doing of an act on certain day is prohibited by statute, it is not sufficient to allege the doing of that act "on or about" the day named in the statute.80 And where by statute the sale of intoxicating liquors is made a criminal offense where made on certain specified days an indictment for such a sale should aver that the sale was made on one of the days named, it not being sufficient to allege that it was made "on or about" one of such days.81 In many cases, however, some of which are decided under statutes dispensing with the necessity of stating time, where time is not of the essence of the offense, it has been held that the words "on or about" may be rejected as surplusage.82 But where the words "on or about" were used in

77. State v. Land, 42 Me. 311.

78. Territory v. Armijo, 7 N. M. 571, 37 Pac. 1117; Barnhouse v. State, 31 Ohio St. 39; State v. Con O'Keefe, 41 Vt. 691; United States v. Crittenden, 25 Fed. Cas. No. 14,890a, Hempst. 61.

79. Clark v. State, 34 Ind. 436.

80. State v. Land, 42 Me. 311, wherein the court said: "On or about, when the day is essential to the commission of the offense, does not mean, in a penal statute or prosecution, the very day." Per Pettit, J.

81. Ruge v. State, 62 Ind. 388; Clark v. State, 34 Ind. 436.

82. United States. — United States v. McKinley, 127 Fed. 168.

Arkansas.—State v. Hoover, 31 Ark. 676.

Connecticut.—Rawson v. State, 19 Conn. 292.

Indiana.—Hampton v. State, 8 Ind. 336.

Kansas.—State v. Harp, 31 Kan. 496, 3 Pac. 432.

See following section as to effect of so stating time under various statutes. a complaint it was decided that a motion to amend by striking them out as surplusage could not be allowed, as, if they were stricken out, the complaint would then state an exact day and such was not the intent of their insertion, they being used to show that there was an uncertainty as to time.<sup>88</sup>

§ 314. Use of words "on or about" — As affected by statute. -Under the statutes in force in many of the States it is sufficient in many cases to aver that the offense was committed "on or about" a certain date.84 Where it is provided by statute that unless time is a material ingredient of the offense the precise date need not be stated in an indictment it is sufficient to allege that the crime was committed "on or about" a specified date.85 Under a statute providing that no indictment or information shall be deemed invalid or defective "for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense, nor for stating the time imperfectly" it has been decided that an information for larceny is sufficient which alleges the commission of the crime "on or about" a certain date.88 In this connection it has been decided that charging an offense to have been committed "on or about" a date, two days before the filing of the information, sufficiently shows that the offense was committed prior thereto without the express averment that it was so committed.87

§ 315. Averment as to statute of limitations — Necessity of. —In the application of the rule that every fact essential to a

83. State v. Baker, 34 Me. 52, holding that the complaint could not be sustained.

84. United States v. McKinley, 127 Fed. 168, decided under Rev. St. U. S., § 1025 (U. S. Comp. St. 1901, p. 720); Bellinger & Cotton's Code, § 1309; State v. Williams, 13 Wash. 335, 43 Pac. 15, decided under Wash. Code, §§ 1239, 1244.

85. Hampton v. State, 8 Ind. 336, decided under 2 Ind. R. S., p. 367, §

56; State v. Perry, 117 Iowa, 463, 91 N. W. 765, decided under Iowa Code, \$5285; State v. Thompson, 10 Mont. 549, 27 Pac. 349, decided under Cr. Prac. Act, §§ 166, 171.

86. Rema v. State, 52 Neb. 375, 72 N. W. 474, decided under Neb. Cr. Code, § 412; Gustavenson v. State, 10 Wyo. 300, 68 Pac. 1006.

87. People v. Miller, 137 Cal. 642, 70 Pac. 735.

description or statement of the offense should be averred it has been determined that the allegation of a day within the period of limitation is material, whenever the offense is subject to limitation. But it is held unnecessary that there should be an express averment that an offense was committed within the period prescribed by the statute of limitations where the date alleged for the commission of the offense was within the period prescribed before the finding of the indictment. 89

§ 316. Averment of facts to avoid bar of statute of limitations.—Where there are facts which operate to avoid the bar of the statute, the true date of the offense should be alleged followed by a statement of facts which would avoid the bar of the statute

88. People v. Miller, 12 Cal. 291; Tipton v. State, 119 Ga. 304, 46 S. E. 436; State v. Snyder, 182 Mo. 462, 82 S. W. 12; Commonwealth v. Nailor, 29 Pa. Super. Ct. 271.

The words "inhabitant of" and "usually resident within," as used in a statute of limitations providing that the time which an accused person is not "an inhabitant of or usually resident within this State," is not to be included as a part of the time designated by the statute as operating to bar a prosecution, are held to be synonymous. State v. Snyder, 182 Mo. 462, 82 S. W. 12.

Burden of proof.—Where the period of time prescribed by the statute of limitations has passed and facts are set forth in the indictment which operate to avoid the bar, the burden of proof is on the State to establish those facts. State v. Snyder, 182 Mo. 462, 82 S. W. 12.

Unless an indictment for misdemeanor is returned in Kentucky within twelve months after the commission of the offense, the statute of limitations operates as a bar to the prosecution; therefore time is a material ingredient in the offense, and if the indictment fails to allege that the offense was committed within twelve months before the finding of the indictment, and the date alleged shows that it was commmitted more than twelve months before the indictment was returned, a demurrer should be sustained. Commonwealth v. Megibben Co., 101 Ky. 195, 40 S. W. 694; Williams v. Commonwealth, 18 Ky. Law Rep. 667.

In Kentucky it is provided by Code that "The statement in the indictment as to the time at which the offense was committed is not material further than the statement that it was committed before the time of finding the indictment, unless the time be a material ingredient to the offense." Ky. Crim. Code, § 129. See Williams v. Commonwealth, 18 Ky. Law Rep. 667, 37 S. W. 839; Commonwealth v. Cain, 14 Bush (Ky.), 525.

89. Commonwealth v. Cook Co.,

as an excuse for not having preferred the indictment sooner.90 Where the time that an accused person is out of the State is excluded in computing the time for the operation of the statute of limitations, this exception should be stated in the pleading, it being declared that prima facie the lapse of time is a good defense, and that if the statutory exception is relied on the State should set it up.91 So under a statute providing for the prosecution of certain offenses where the prosecution is commenced within one year from the time it has been made known to a public officer having authority to direct a public prosecution, it is essential when one year has elapsed since the offense was committed to insert in the indictment or information the averment to remove the bar of pre-In this connection it is said in a case in Kentucky: scription.92 "Ordinarily the offense must be laid in the indictment within the time fixed by the statute of limitation. Where, however, the statute does not impose an absolute bar, the prosecution may lay the offense outside the statute and prove without averment that the defendant was within the exception. But wherever a statute exists limiting prosecutions within fixed periods the most exact course is

102 Ky. 288, 43 S. W. 400, citing and following Stamper v. Commonwealth, 102 Ky. 33, 42 S. W. 915.

90. State v. Bilbo, 19 La. Ann. 76; State v. Peirce, 19 La. Ann. 90; State v. Snyder, 182 Mo. 462, 82 S. W. 12; State v. Meyers, 68 Mo. 266; Blackman v. Commonwealth, 124 Pa. St. 578; Hickman v. State, 44 Tex. Cr. 533, 72 S. W. 587.

It is a fatal defect where it is shown on the face of an indictment that prosecution for the offense charged is barred by statute. State v. Ball, 30 W. Va. 382, 4 S. E. 645.

91. People v. Miller, 12 Cal. 291.

Sufficiency of averment.—Under a statute providing that "if any person, who has committed an offense is absent from the State, or so conceals himself that process cannot

be served on him, or conceals the fact of the crime, the term of absence or concealment shall not be included in computing the period of limitations," concealment is held to be sufficiently averred by alleging that "ever since the offense herein charged that defendant has continuously so concealed himself that process could not be served upon him." State v. Rook, 61 Kan. 382, 59 Pac. 653, decided under Gen. St. 1897, chap. 102, § 33.

92. State v. Hinton, 49 La. Ann. 1354, 22 So. 617, holding in such a case that the allegation that the offense has "just come to the knowledge of an officer having authority to prosecute" is sufficient. See State v. Wren, 48 La. Ann. 803, 19 So. 745.

to state the time correctly in the indictment, and then aver the exceptions, and this mode of pleading is now generally required."93

- § 317. Same subject Where prosecution re-referred to grand jury Continuous prosecution.—Where a prosecution has been re-referred to a grand jury, a new indictment which has been found by them will not be regarded as a continuation of a former prosecution, so as to avoid the operation of the statute of limitations where there is no allegation upon its face of facts as to the former indictment thus showing that the prosecution was intended to be a continuous one.<sup>94</sup>
- § 318. Necessity of repeating time and place.—It has been said that if taking the indictment as a whole, a day is specified as to any issuable averment, the objection will not be fatal because the day is not repeated with every issuable fact; 35 and that if time and place are stated in the beginning of a sentence and may be grammatically read as applying to facts subsequently averred they need not be again averred or referred to by the use of the words "then and there." So the omission of the words "then and
- 93. N. N. & M. V. Co. v. Commonwealth, 14 Ky. Law Rep. 197. Per Yost, J., citing Wharton's Crim. Pleading & Practice, § 318; Bishop on Criminal Procedure; 405.
- 94. N. N. & M. V. Co. v. Commonwealth, 14 Ky. Law Rep. 196. Compare State v. Duclos, 35 Mo. 237.

95. State v. Coleman, 8 S. C. 237,243. Per Moses, J.

See in this connection Noe v. People, 39 Ill. 96; Thayer v. State, 11 Ind. 287; State v. Reid, 20 Iowa, 413; State v. Watrous, 13 Iowa, 489; State v. Baker, 50 Me. 45.

96. Bobel v. People, 173 III. 19, 50 N. E. 322, 64 Am. St. Rep. 64; Turns v. Commonwealth, 6 Metc. (Mass.), 224. See State v. Harris, 106 N. C. 682, 11 S. E. 377.

In an indictment for perjury,

in averring the authority of an officer to administer an oath, it is not necessary to aver that he "then and there" had authority, if time and place had been added to the act of taking the oath before him. State v. Dayton, 23 N. J. L. 49.

Indictment for unlawfully removing timber.—The words "then and there" in stating the value of timber unlawfully removed from the premises of another are not necessary. State v. Blackwell, 3 Ind. 529.

Averment declaring legal conclusion.—The words then and there need not be repeated to an averment which merely declares a legal conclusion. State v. Willis, 78 Me. 70, 2 Atl. 848.

An indictment for a felonious assault and battery, which lays a

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there" in a clause describing the uses of a tenement which it is charged is maintained as a nuisance has been held to be of no importance. And a code provision that no indictment shall be quashed "for the want of an allegation of the time or place of any material fact, when the venue and time have once been stated, has reference not only to the repeating the language itself but also renders unnecessary the use of the words "then and there." Again it has been decided that the rule which requires time and place to be repeated to those averments which are traversible is not as strictly applied in indictments for inferior offenses as in those where the offense charged is one which endangers the life of the accused. 99

§ 319. Where indictment charges future or impossible day.— It is a general rule that an indictment is fatally defective if it charges the commission of the offense as subsequent to the date upon which the indictment is found or on an otherwise impossible date.¹ So it has been declared that if the indictment lay the

venue to the assault and the stroke, has been held sufficient, though there is no venue expressly stated in respect to the maiming, wounding and disfiguring. State v. Bailey, 21 Mo. 484. See, also, State v. Freeman, 21 Mo. 481.

97. Commonwealth v. Langley, 14 Gray (Mass.), 21, citing Commonwealth v. Barker, 12 Cush. (Mass.) 186; Commonwealth v. Bugbee, 4 Gray (Mass.), 206; Commonwealth v. Sullivan, 6 Gray (Mass.), 477. See also State v. Doyle, 15 R. I. 527, citing the above case.

98. Turpin v. State, 80 Ind. 148, construing Cr. Code, § 181.

99. State v. Willis, 78 Me. 70, 2 Atl. 848.

Alabama.—McGehee v. State,
 Ala. 154.

Indiana.—Terrell v. State, 165 Ind. 443, 75 N. E. 884. Iowa.—Walters v. State, 5 Iowa, 507.

Kentucky. — Commonwealth v. Aultmire, 22 Ky. Law Rep. 511, 58 S. W. 369.

Maine.—State v. O'Donnell, 81 Me. 271, 17 Atl. 66.

Mississippi.—Serpentine v. State, 1 How. 256.

Missouri.—Markley v. State, 10 Mo. 291.

New Hampshire.—State v. Pratt, 14 N. H. 456.

New Jersey.—State v. Jones, 8 N. J. L. 307.

North Carolina.—State v. Sexton, 3 Hawks, 184; State v. Woodman, 3 Hawks, 384.

Pennsylvania. — Commonwealth v. Nailor, 29 Pa. Super. Ct. 271.

Texas.—Joel v. State, 28 Tex. 642; Womack v. State (Tex. App.), 19 S. W. 605. offense on an uncertain or impossible day, as where it lays it on a future day, or lays one and the same offense on different days, or lays it on a day which makes the indictment repugnant to itself, it will be void.<sup>2</sup> And an indictment which charges the commission of an offense on a date subsequent to the finding of the indictment will not be sustained though it is provided by statute that no indictment shall be regarded as insufficient by reason of a failure to state the time when the offense was committed or for stating it imperfectly unless time is of the essence of the offense.3 But in an early case in Georgia it is decided that an objection that an impossible day is stated in an indictment as that on which the offense was committed comes too late after verdict.4 And though an offense may be laid as having been committed after the finding of the indictment yet it has been decided that this may be rejected as surplusage where a day certain is laid before.<sup>5</sup> And it is said to be unnecessary to allege in express terms that the offense was committed before the finding of the bill where this is the plain import of the indictment from the language used.6

## § 320. Same subject continued - Application of rule. In

Vermont.—State v. Litch, 33 Vt. 67.

An indictment against an accessory must, in addition to other matter, contain all the averments which would be necessary in an indictment against the principal, and it should be alleged therein that the crime of the principal was committed before it was found and presented. People v. Thrall, 50 Cal. 415.

- 2. State v. Pratt, 14 N. H. 456. Per GILCHRIST, J.
- 3. Terrell v. State, 165 Ind. 443, 75 N. E. 884.

See also State v. Smith, 88 Iowa, 178, 55 N. W. 198, holding that such a defect is fatal, though it is provided by Code that no indictment shall be regarded as insufficient by

reason of a failure to state the time of any material fact when the time has once been stated, or if it can be understood that the offense was committed prior to the finding of the indictment.

4. Conner v. State, 25 Ga. 515, 71 Am. Dec. 184, holding that it was not a good ground for the arrest of judgment in a criminal case that the time stated as the time of the offense was subsequent to the finding of the indictment.

Compare Commonwealth v. Hitchings, 5 Gray (Mass.), 482.

- 5. State v. Woodman, 10 N. C. 384. See Jones v. Commonwealth, 1 Bush (Ky.), 34, 89 Am. Dec. 604, decided under Ky. Cr. Code, § 130.
  - 6. State v. Pratt, 14 N. H. 456.

## § 321 Charging the Offense—Particular Averments.

the application of the general rule stated in the preceding section it has been decided that an indictment for resisting an officer is fatally defective where the commission of the offense is charged as of a time subsequent to the return day of the process. And an indictment is defective which alleges the commission of an act at a time subsequent to the passage of the statute making such act an offense. And an indictment has also been held insufficient which charged the commission of an offense on a specified date in a certain county where the law creating the county was not passed until a date subsequent to that alleged. But where the year which was stated incorrectly in an indictment was blotted out and the correct date inserted, it was held that the court properly refused to quash the indictment on the ground that an impossible date was alleged. Of

§ 321. Charging offense as of same day indictment found.— An indictment may allege that the offense was committed on the same day it was returned into court, but in such a case it is decided that it should also contain the allegation that the offense was committed prior to the finding on the indictment.<sup>11</sup> An indictment, however, which charges the commission of the offense on the same day on which it is found is held to sufficiently show that the offense was committed prior to the finding of the indictment where the offense is charged in the past tense.<sup>12</sup> And in this connection it has been decided that the attendant facts and conditions which

7. McGehee v. State, 26 Ala. 154.

8. Hodnett v. State, 66 Miss. 26, 5 So. 518, holding that this is true, though it is provided by code that an indictment shall not be regarded as insufficient, where time is not of the essence of the offence, though it omits to state the time of the commission of the offense or states the time imperfectly or charges it as committed on an impossible day or a day that never happened.

See Commonwealth v. Aultmire, 22 Ky. Law Rep. 511, 58 S. W. 369;

Nichol's Case, 7 Gratt. (Va.) 589, holding an indictment good in which the time of the offense was changed from a day previous to the operation of the statute to a day subsequent.

9. State v. Jones, 8 N. J. L. 307.

10. Jacobs v. State, 42 Tex. Cr. 353, 59 S. W. 1111.

11. Joel v. State, 28 Tex. 642; Gill v. State (Tex. Cr. App.), 20 S. W. 578. But see People v. Squires, 99 Cal. 327, 33 Pac. 1092.

12. State v. Pratt, 14 N. H. 456, cited and followed in State v. Emmett,

make the act charged an indictable offense should not be charged as of the time when the indictment is found, but they should be charged to have existed at the time the alleged offense was committed.<sup>13</sup>

§ 322. Offense consisting of succession of acts — Charging with a continuando.—It may be stated generally that where an offense consists of a succession of acts, an indictment therefor may properly charge that the offense was committed on a given day and "on divers other days between that day and the day of the finding of the indictment." So where an offense charged is continuous, as a prohibited traffic, carried on from day to day, it may be laid with a continuando. In this connection it is said in an early case in Massachusetts where the objection was raised that a count was too general in charging the unlawful sale of liquors on

23 Wis. 632. See also Williams v. Commonwealth, 13 Ky. Law Rep. 893, 18 S. W. 1024.

See Wilson v. State, 15 Tex. App. 150, holding in the case of an information filed on the thirty-first day of August, 1883, that the allegation that the offense was committed "heretofore on the thirty-first day of August, 1883" sufficiently showed the commission of the offense before the filing of the information.

13. Sikes v. State, 67 Ala. 77, holding an indictment defective which charged that "James D. Sikes, a person who is the owner or keeper of a saloon in which vinous, spirituous, or other intoxicating liquors are kept for sale, having a billiard table connected therewith, on which the public can play, knowingly permitted Charley McCaskill, a minor, to play thereon."

14. State v. Cafren, 48 Me. 364, so holding in case of an indictment for being a common seller of intoxicating liquors. Commonwealth v. Langley,

14 Gray (Mass.), 21, so holding in case of an indictment charging the keeping of a house of ill fame. Commonwealth v. McKenney, 14 Gray (Mass.), 1; People v. Adams, 17 Wend. (N. Y.) 475; State v. Brown (N. D. 1905), 104 N. W. 1112. Compare Commonwealth v. Adams, 4 Gray (Mass.), 11.

Indictment for manslaughter caused by negligence in erection of buildings.—An indictment under the New York Penal Code, §§ 193, 195, charging such an offense sufficiently alleges the time of the offense, though it is a continuous one, by charging it as having been committed "heretofore and prior to the 13th day of April, 1885, also divers days and times up to the said 13th day of April, 1885." People v. Buddensieck, 4 N. Y. Cr. R. 230, affirmed 103 N. Y. 487, 3 N. Y. St. R. 664, 5 N. Y. Cr. R. 69.

15. Our House No. 2 v. State, 4 G. Greene (Iowa), 172.

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a day certain and on divers days since: "If this were a mode of criminal pleading, now for the first time presented for the consideration of the court, it would certainly deserve great consideration, whether it is sufficiently certain and precise to satisfy the rules of law upon that subject. But such averments are allowable in many cases, and almost from the necessity of the case, as in case of a common barrator, common scold, common brothel, etc., and we consider that this form of indictment has long been allowed in practice upon this and prior analogous statutes. 16 And in such cases, common practice, allowed and unquestioned, is of great authority, and stands, like other precedents, as high evidence of the law. Sanctioned by such practice, the court are of opinion that it is sufficient."17 And a similar doctrine is asserted in a later case in the same State.18 But where the commission of a single and distinct offense is charged on a day certain and on divers other days and times before and after that day it is held that the words after the day specified may be rejected as surplusage. 19 In this connection, however, it is decided that some particular day must be alleged as the day upon which some one of the acts charged was done. So an indictment has been held to be insufficient where it charged the commission merely on "sundry and divers days" between certain specified dates but which did not

<sup>16.</sup> Commonwealth v. Pray, 13 Pick. (Mass.) 359.

<sup>17.</sup> Commonwealth v. Odlin, 23 Pick. (Mass.) 275. Per Shaw, J.

<sup>18.</sup> Commonwealth v. Gardner, 7 Gray (Mass.), 494, wherein it is said: "Another class of offenses authorize and may require a more extended allegation of the time in which they were committed; as where a series of acts may enter into and constitute the offense. Such is the case of being a common seller. Sometimes the fact may be established by the acts of the party done on a single day; and, therefore, an indictment for this offense, alleging it to have been committed on some one particular day,

would be a good indictment. But usually in practice and from the necessity of the case, it alleges the offense as having been committed on a particular day named, and divers other days between that day and some other subsequent day particularly named; or as committed upon a particular day named, and divers days between that day and the time of finding the indictment. These forms of indictment have, in reference to this class of offenses, been fully sanctioned by this court." Per DEWEY, J., citing Commonwealth v. Elwell, 1 Gray (Mass.), 463; Commonwealth v. Wood, 4 Gray (Mass.), 11.

<sup>19.</sup> Cook v. State, 11 Ga. 53, 56

state any particular day on which any one of the acts named was committed.<sup>20</sup> And the principle that some particular day must be named in the indictment on which the alleged offense was committed, and that too, even if the offense be set out with a continuando, is said to apply as strongly to an act of non-feasance as to an act of misfeasance when such act can logically and correctly be described as having been done on some particular day or upon some particular days. But where the offense consists of an omission and cannot properly be charged as having been done on any particular day or days, as in the case of an indictment against a municipal corporation for failure to open a highway for a certain period of time, the offense may properly be charged as having been committed during the entire period, without naming a particular day or days.<sup>21</sup>

§ 323. Necessity of stating time — Statutory provisions affecting.—The common law rule as to the necessity of specifically stating a time when the offense was committed is now to a great extent modified or dispensed with by reason of statutory provisions.<sup>22</sup> So in some States it is expressly provided by statute that a failure to state the time at which an offense was committed in any case in which time is not the essence of the offense, or stating the time imperfectly, unless time is of the essence of the offense, will not render the indictment insufficient.<sup>23</sup> And in other States statutes of a similar import have been passed, such as that the statement in an indictment as to the time the offense was com-

Am. Dec. 410; People v. Adams, 17 Wend. (N. Y.) 475; State v. Munger, 15 Vt. 291.

20. State v. Beaton, 79 Me. 314, 9 Atl. 728, citing State v. Baker, 34 Me. 52; State v. Hanson, 39 Me. 337.

21. State v. City of Auburn, 86 Me. 276, 29 Atl. 1075.

22. McGuire v. State, 37 Ala. 161; Molett v. State, 33 Ala. 408; State v. Hutchinson, 111 Mo. 257, 20 S. W. 34; State v. Pratt, 98 Mo. 482, 11 S. W. 977; Lucas v. State, 27 Tex. App. 322, 11 S. W. 443. See also cases in notes following in this section.

23. Armstrong v. State, 145 Ind. 609, 43 N. E. 886, decided under Ind. R. S. 1881, § 1756; Ind. R. S. 1894, § 1825, and citing in this connection State v. Scammons, 95 Ind. 22; State v. McDonald, 106 Ind. 233, 238; State v. Patterson, 116 Ind. 45, 10 N. E. 89; Fleming v. State, 136 Ind. 149; 36 N. E. 154. See also State v. Ackerman, 51 La. Ann. 1213, 26 So. 80, decided under La. Rev. St., § 1063;

mitted is not material, further than as a statement that it was committed before the finding of the indictment, except where time is a material ingredient of the offense,<sup>24</sup> or that the time at which the offense was committed need not be stated in the indictment. but the offense may be alleged to have been committed on any day before the finding thereof or generally before the finding of the indictment, unless the time is a material ingredient in the offense.25 Under a statute of this kind it has been held sufficient to aver that the offense was committed within the period prescribed by the statute of limitations preceding the return of the indictment, the exact time and date being to the grand jurors unknown.26 Under the Code in Texas it is necessary that an indictment should show that the offense was committed anterior to the finding by the grand jury,27 or in the case of an information that the offense was committed anterior to the filing of the information.28 And by the Code in Kentucky it was early provided that an indictment should be regarded as sufficient, though the precise date was not alleged, if it appeared that the offense was committed prior to the finding of the indictment,29

§ 324. Omission to state time supplied by reference to caption or other parts of indictment.—The time of the commission of an offense may be sufficiently stated by reference to a time previously set forth,<sup>30</sup> as where it is expressed in a prior count.<sup>31</sup>

State v. Peters, 107 N. C. 876, 12 S. E. 74, decided under N. C. Code, § 1189.

24. State v. Hoover, 31 Ark. 676, Gantt's Dig., § 1796. See People v. Kelly, 6 Cal. 210; People v. Miller, 137 Cal. 642, 70 Pac. 735; Cal. Pen. Code, § 988.

25. State v. Parker, 5 Lea (Tenn.), 568; Tenn. Code, § 5124. See also Molett v. State, 33 Ala. 408, decided under Ala. Code, § 3512.

26. Armstrong v. State, 145 Ind. 609, 613, 43 N. E. 886. See King v. State, 3 Heisk. (Tenn.) 148.

27. Joel v. State, 28 Tex. 42. See

Coleman v. State (Tex. Cr. 1901), 62 S. W. 753, decided under White's Ann. Code Cr. Proc., art. 439, subd. 6.

28. Kennedy v. State, 22 Tex. Cr. 693, 3 S. W. 480; Williams v. State, 12 Tex. App. 226; Tex. Code Cr. Proc., art. 430.

29. Jones v. Commonwealth, 1 Bush (Ky.), 34, decided under Ky. Cr. Code, § 130.

30. State v. Schultz, 57 Ind. 19, holding use of words "then and there" sufficient reference.

31. Mills v. State, 8 Mo. 52; Morgan v. State, 3 Tex. Cr. 1, 18 N. W. 647.

And it has been decided that an indictment is good in which the day of the commission of the offense is laid by reference to the caption.32 If the time has been expressed in a prior part of the indictment it is generally sufficient to refer thereto by the words "then and there."33 And where in an indictment for manslaughter the wounding was charged of one date and the death as of another, it was decided that after conviction the prisoner could not take advantage of an uncertainty as to time, arising from the averment that the defendant killed the deceased "on the day and year afore-And it is also said that the rule is well settled that an indictment will be good if the day and year can be collected from the whole statement though they be not expressly averred.35 So it is not necessary that there should be an express averment that the offense was committed prior to the finding of the indictment, it being sufficient to allege that it was committed on a certain day, if it appears from the record that the day was prior to the finding of the indictment.36

§ 325. Omission to state or defect in, stating time — Power to amend.—Where the time of an offense is an essential ingredient thereof, it constitutes a matter of substance and an omission to state it cannot be amended.<sup>37</sup> But where it is provided by statute

32. Jacobs v. Commonwealth, 5 Seig. & R. (Pa.) 315. See also State v. Paine, 1 Ind. 163.

See § 175 herein.

Charging the time "on the first day of August in the present year" was held good in an indictment which stated the term in its caption as "Fall Term, 1822." State v. Haddock, 9 N. C. 461.

33. United States. — United States v. Potter, 56 Fed. 83.

Indiana.—State v. Schultz, 57 Ind. 19.

Massachusetts.—Commonwealthv. Robertson, 162 Mass. 90, 38 N. E. 25.

**South Carolina.**—State v. Stewart, 26 S. C. 125, 1 S. E. 468.

**Texas.**—Caldwell v. State, 28 Tex. App. 566, 14 S. W. 122.

**Vermont.**—State v. Ferry, 61 Vt. 624, 18 Atl. 451.

**34.** Reynolds v. People, 17 Abb. Pr. (N. Y.) 413.

35. Gill v. People, 3 Hun (N. Y.), 187, affirmed 60 N. Y. 643.

**36**. Gratz v. Commonwealth, 96 Ky. 162, 22 S. W. 159.

If the plain import of the indictment be that the offense was committed prior to the finding of the bill it is not necessary to allege such fact in express terms. State v. Pratt, 14 N. H. 456.

37. Little v. State (Tex. App.), 19 S. W. 332.

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that in those cases where time is not of the essence of the offense no indictment shall be held insufficient for failure to state it, or for imperfectly stating it, the time of the commission of an offense as alleged in an indictment may be amended, provided it is not an essential element of the offense.<sup>38</sup>

38. People v. Hoffman, 142 Mich. 531, 105 N. W. 838, decided under Mich. Comp. Laws, §§ 11, 575.

#### CHARGING THE OFFENSE—PARTICULAR AVERMENTS.

#### CHAPTER XII.

#### CHARGING THE OFFENSE—PARTICULAR AVERMENTS CONTINUED.

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- 367. Same subject; sufficiency of averment.
- 368. Same subject; as to jurisdiction of prior offense.
- 369. Same subject; statute making it unnecessary to allege prior conviction; constitutionality of.
- 370. Same subject; averment as to discharge; sentence.

Sec. 326. When necessary to aver intent.—In those cases where the intent is an essential element of the crime, constituting a material ingredient of the offense, and descriptive of it, such intent must be charged in the indictment.<sup>1</sup> As to the necessity of averring intent it is said in a case in Massachusetts: "The true

1. United States.—Greene v. Mac-Dougall, 199 U. S. 601, 26 S. Ct. 748, 50 L. Ed. 328; Evans v. United States, 153 U. S. 584, 608, 38 L. Ed. 830, 839, 14 Sup. Ct. 934, 939; United States v. Green, 136 Fed. 618; United States v. Garretson, 42 Fed. 22; United States v. Wentworth, 11 Fed. 52.

Alaska.—United States v. Alaska Packers' Ass'n, 1 Alaska, 217.

Arkansas.—Mott v. State, 29 Ark. 147; State v. Eldridge, 12 Ark. 608; Gabe v. State, 6 Ark. 519.

**California.**—People v. Mitchell, 92 Cal. 590, 28 Pac. 597, 788; People v. Ward, 85 Cal. 585, 24 Pac. 785.

**Florida.**—Wiggins v. State, 23 Fla. 180, 1 So. 693.

Indiana.—State v. Freeman, 6 Blackf. 248.

Iowa.—State v. Clark, 80 Iowa, 517, 45 N. W. 910.

**Kansas.**—State v. Child, 42 Kan. 611, 22 Pac. 721.

Michigan.—Wilson v. People, 24 Mich. 410.

Minnesota.—State v. Ullman, 5 Minn. 13.

Mississippi.—Edwards v. State (Miss.), 8 So. 464; Norman v. State, 24 Miss. 54.

Missouri.—State v. Clayton, 100 Mo. 516, 13 S. W. 819.

Nebraska.—Winslow v. State, 26 Neb. 308, 41 N. W. 1116; Schaffer v. State, 22 Neb. 557, 35 N. W. 384, 3 Am. St. Rep. 274.

New York.—Miller v. People, 5 Barb. 203; People v. Lohman, 2 Barb. 216; People v. Enoch, 13 Wend. 159, 27 Am. Dec. 197.

Tennessee.—Vaughn v. State, 3 Coldw. 102.

**Texas.**—O'Brien v. State, 27 Tex. App. 448, 11 S. W. 459.

Vermont.—State v. Switzer, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789; State v. Collins, 62 Vt. 195, 19 Atl. 368. distinction seems to be this, when by the common law or by the provision of a statute a particular intention is essential to an offense, or a criminal act is attempted but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegation by proof. On the other hand, if the offense does not rest merely in tendency, or in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed and need not be alleged, or, if alleged, it is a mere formal averment which need not be proved. In such case, the intent is nothing more than the result which the law draws from the act, and requires no proof beyond

Washington.—State v. So Ho Me, 1 Wash. 276, 24 Pac. 443; State v. So Ho Ge, 1 Wash. 275, 24 Pac. 442; Blanton v. State, 1 Wash. 265, 24 Pac. 439; United States v. Johns, 1 Wash. 363.

Sufficiency of averment of intent in particular cases, see:

Alabama.—White v. State, 86 Ala. 69, 5 So. 674 (indictment for obtaining money by false pretenses).

Arkansas.—State v. Robinson, 55 Ark. 439, 18 S. W. 541 (indictment for assault with intent to kill); Felker v. State, 54 Ark. 489, 16 S. W. 663 (indictment for assault with intent to kill).

California.—People v. Forney, 81 Cal. 118, 22 Pac. 481 (information for assault with a deadly weapon).

Indiana.—State v. Jenkins, 120 Ind. 268, 22 N. E. 133 (indictment for assault and battery with intent to commit murder).

Iowa.—State v. Grant, 86 Iowa, 216, 53 N. W. 120 (indictment for conspiracy).

Louisiana.—State v. Causey, 43 La. Ann. 897, 9 So. 900 (indictment for shooting with intent to kill). Michigan.—People v. Ellsworth, 90 Mich. 442, 51 N. W. 531 (indictment for assault and battery).

Minnesota.—State v. Hackett, 47 Minn. 425, 50 N. W. 472 (indictment for larceny).

Missouri.—State v. Woods, 124 Mo. 412, 27 S. W. 1114 (indictment for assault with intent to kill); State v. Noland, 111 Mo. 473, 19 S. W. 715 (indictment for embezzlement of public moneys).

Montana.—Territory v. Cadas, 8 Mont. 347, 21 Pac. 26 (indictment for murder in the first degree).

Nebraska.—Willis v. State, 43 Neb. 102, 61 N. W. 254 (indictment for murder).

Texas.—Atkinson v. State, 34 Tex. Cr. 424, 30 S. W. 1064 (indictment for assault with intent to rob); Runnells v. State, 34 Tex. Cr. 431, 30 S. W. 1065 (indictment for assault with intent to rob).

Utah.—People v. Halliday, 5 Utah, 467, 17 Pac. 118 (indictment for shooting with intent to kill).

Washington.—State v. Sufferin, 6 Wash. 109, 32 Pac. 1021 (indictment for burglary).

that which the law itself supplies."<sup>2</sup> So where an act is by statute made criminal only if done with a particular intent, the intent must be alleged and proved according to the terms of the statute.<sup>3</sup> And where by statute it is made an offense to "wittingly" alter a record an indictment thereunder should charge that the act was so done.<sup>4</sup> The rule requiring an averment of intent where a material ingredient of the offense has been applied to an indictment for arson;<sup>5</sup> for an assault with intent to commit a felony;<sup>6</sup> for bur-

It is a general rule that where an evil intent, accompanying an act, is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved. State v. West, 10 Tex. 553, Per WHEELER, J.

It is a familiar rule of criminal pleading, that whenever the intention of a party is necessary to constitute an offense, such intent must be alleged in every material part of the description where it so constitutes it. Commonwealth v. Boynton, 12 Cush. (Mass.) 499. Per BIGELOW, J.

Intent may be averred in general terms.—Evans v. United States, 153 U. S. 584, 608, 38 L. Ed. 830, 839, 14 Sup. Ct. 934, 939.

Statutes in some cases modify the rule as to the necessity of averring the intent with which an act is done. Purcelly v. State, 29 Tex. App. 1, 13 S. W. 993; State v. Wilson, 9 Wash. 218, 37 Pac. 424.

Indictment for forgery.—An averment in an indictment that the instrument was forged and uttered with the "felonious intent to feloniously cheat and defraud" has been held to be a sufficient averment of the criminal intent, although it is said that there is a useless repetition of epithets. Garmire v. State, 104 Ind. 444, 4 N. E. 54.

In an indictment for robbery the words "felonious" and "rob" have been held to carry with them the intent and to be sufficient as an averment of intent. People v. Butler, I Ida. 231.

The words "feloniously and maliciously" have been held, ex vi termini, to import that the act charged was done with an unlawful intent. Commonwealth v. Adams, 127 Mass. 15.

- 2. Commonwealth v. Hersey, 2 Allen (Mass.) 173, 180. Per BIGELOW, J.
  - 3. State v. Malloy, 34 N. J. L. 410.

Where the statute makes intent the substance of the offense defined therein, an indictment under such statute should state the intent. People v. Martin, 52 Cal. 201.

- 4. Harrington v. State, 54 Miss. 490, construing an indictment framed under § 2489, Code 1871.
  - 5. Mott v. State, 29 Ark. 147.
- 6. State v. Child, 42 Kan. 611, 22 Pac. 721; State v. Clayton, 100 Mo. 516, 13 S. W. 819. See State v. Harrison, 82 Iowa, 716, 47 N. W. 777; State v. Clark, 80 Iowa, 517, 45 N. W. 910; Schaffer v. State, 22 Neb. 557, 35 N. W. 384, 3 Am. St. Rep. 274.

glary; for murder in the first degree; for casting away and destroying a vessel on the high seas; for obtaining a person's signature by false pretenses; for perjury; to an information for forgery and uttering a forged instrument, and to an affidavit for the prosecution of a tenant for the removal by him of property from the premises leased. And it has been decided that the conclusion of an indictment for homicide that so the grand jurors on their oaths aforesaid do find and say that he did feloniously, purposely, and maliciously kill the deceased, does not cure the defect in the indictment caused by the failure to aver the intent to kill in describing the offense.

§ 327. When intent need not be averred.—Where the act charged is one which necessarily involves and includes the intent it is not necessary that an intent should be alleged. In these cases the intent is the natural and necessary consequence of the act done, from which the law infers that the party knew and contemplated the result which followed, and that it was committed with a guilty intention. So it is said in an early decision in Alabama

Winslow v. State, 26 Neb. 308,
 N. W. 1116; O'Brien v. State, 27
 App. 448, 11 S. W. 459.

8. Wiggins v. State, 25 Fla. 180, I So. 693. See Blanton v. State, I Wash. 265, 24 Pac. 439.

9. United States v. Johns, 1 Wash. 363.

10. State v. Switzer, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789.

11. State v. Collins, 62 Vt. 195, 19 Atl. 368.

12. People v. Mitchell, 92 Cal. 590, 28 Pac, 597, 788.

13. Edwards v. State (Miss.), 8 So. 464.

Schaffer v. State, 22 Neb. 557,
 N. W. 384, 3 Am. St. Rep. 274.

15. Commonwealth v. Hersey, 2 Allen (Mass.), 173.

As to when averment of in-

tent is unnecessary, see following cases:

**Dakota.**—Territory v. Anderson, 6 Dak. 300 (indictment for larceny).

Kansas.—State v. Combs, 47 Kan. 136 27 Pac. 818 (information for wrongfully embezzling and converting money); State v. Bush, 45 Kan. 138, 25 Pac. 614 (information for illegal registration of one as a voter).

Massachusetts.—Commonwealthv. Shea, 150 Mass. 314, 23 N. E. 47 (indictment for keeping house of ill fame).

Missouri.—State v. Rowlen, 114 Mo. 626, 21 S. W. 729 (indictment for forgery).

**Pennsylvania.** — Commonwealth v. Butler, 144 Pa. St. 568, 24 Atl. 910 indictment for larceny); Commonwealth v. Wolfinger, 7 Kulp. 537, 16

that "whenever one does an act legally wrong in itself, the law presumes the intent to do that act; the act, of itself, evidences the legal intent. The doing of an act in its nature illegal—illegal without any extrinsic qualification—of itself evidences the criminal intent."16 And in another case it is declared that where the act is in itself unlawful, an evil intent will be presumed, and need not be averred; and if averred, is a mere formal allegation, which need not be proved by extrinsic evidence.<sup>17</sup> And it is also said that "when the facts going to make out the crime are well pleaded, the law will infer the intent of the accused to commit the crime, as sane men are presumed to intend the plain and obvious consequences of their acts. 18 So an attempt to commit a wilful and malicious crime is held to import ex vi termini an intent to commit that crime. In such a case the attempt is said to include the intent. 19 And where an act is made a criminal offense by statute and intent is not an essential ingredient of the offense, an averment of intent is not necessary.20 In New York the question as to whether the crime was committed under such circumstances with reference to intent, as makes it murder in the first degree within the statutory definition, has been held, under several changes of the statute defining that crime, to be one of evidence

Pa. Co. Ct. R. 257 (indictment for libel).

West Virginia.—State v. Pearis, 35 W. Va. 320, 13 S. E. 1006 (indictment for furnishing a voter with liquor on election day).

The theory of the law is, that a criminal intent is a necessary ingredient of every indictable offense. The maxim is, Actio non facit reum, nisi meus sit rea. Stein v. State, 37 Ala. 123, 132. Per WALKER, J.

An intent to kill need not be averred in an indictment charging that the killing was done while the accused was engaged in the commission of a felony. Cox v. People, 80 N. Y. 500.

16. Stein v. State, 37 Ala. 123, 133. Per WALKER, J.

17. State v. West, 10 Tex. 553. Per Wheeler, J.

18. Tomkins v. State, 33 Tex. 228.

19. Commonwealth v. McLaughlin, 105 Mass. 460, holding that an averment that the defendant attempted "unlawfully, wilfully and maliciously to administer" poison to a horse sufficiently charged the attempt and the intent.

20. Bolen v. People, 184 Ill. 338, 56 N. E. 408; People v. Walbridge, 6 Cow. (N. Y.) 512; People v. Webster, 17 Misc. (N. Y.) 410, 40 N. Y. Supp. 1135; State v. Smith, 17 R. I. 371, 22 Atl. 282.

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determinable by the jury under the instructions of the court.21

§ 328. Offense "with intent to defraud"—Sufficiency of averment.—In an indictment for an offense done with intent to defraud it is sufficient to aver in the general words that it was done "with intent to defraud," it being held that the pleader is not required to set out the evidence or facts going to prove the intent to defraud or the particular means by which the party named in the indictment was to be defrauded.<sup>22</sup>

§ 329. Malice — Necessity of averring — Sufficiency of averment.—In case of felony in which malice is the gist of the offense, an averment of malice is essential or otherwise the indictment will be defective.<sup>23</sup> And where a malicious intent is an essential in-

21. People v. Conroy, 97 N. Y. 62. In case of a homicide, the particular intent with which it was committed was not required to be set forth even under the strictest rules of pleading, it being uniformly deemed sufficient to allege it to have been done feloniously, with malice aforethought, and contrary to the form of the statute. People v. Conroy, 97 N. Y. 62, 68, citing People v. Enoch, 13 Wend. (N. Y.) 159; Kennedy v. People, 39 N. Y. 245; People v. Fitzgerald, 37 N. Y. 413.

22. McCarty v. United States, 101 Fed. 113, 41 C. C. A. 242; United States v. Ulrici, 3 Dill. C. C. 532, 535, Fed. Cas. No. 16,594.

23. Maxwell v. State, 68 Miss. 339, 8 So. 546; Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544. See Mann v. State, 47 Ohio St. 556, 26 N. E. 226, 11 L. R. A. 656.

In an indictment for murder an allegation that it was committed with "malice aforethought" is a sufficient averment of express malice in its commission. Smith v. State, 31 Tex. Cr. 14, 19 S. W. 252; Giebel v. State, 28 Tex. App. 151, 12 S. W. 591. But an indictment for murder has been held fatally defective where it alleges that the killing was done with malice "aforesaid" instead of "aforethought." State v. Green, 42 La. Ann. 644, 7 So. 793. And likewise where an indictment against two charged that the act was committed of "his" malice aforethought. State v. Jones, 45 La. Ann. 1454, 14 So. 218

Averment of malice need not be repeated in that part of indictment charging one with being accessory where, by apt and appropriate words, a reference is made to the phrase "with malice aforcthought and with premeditation and deliberation" used in charging the principal. Jones v. State, 58 Ark. 390, 24 S. W. 1073. See State v. Hunter, 42 La. Ann. 814, 8 La. 583, as to necessity of repeating words "malice aforethought" in an indictment for shoot-

gredient in the constitution of an offense created by statute, although it is not made so by the express words of the act, an indictment under it will be invalid unless it contain an averment of the malicious intent.<sup>24</sup> In this connection it has been decided that an allegation that the act was done feloniously and wilfully sufficiently charges that it was done maliciously.<sup>26</sup>

§ 330. Averment as to wilfulness of act — Sufficiency of.—In many instances a statute makes a certain act an offense where it is done wilfully and in such a case wilfulness is an essential element of the crime and, in describing the offense it is necessary that the word wilfully should be used, or words equivalent in their meaning.<sup>26</sup> While, however, it is not always necessary to follow the

ing, while lying in wait with intent to murder.

In New York in an indictment under the Act of 1876, specifying the cases which should be murder in the first degree, it was not necessary that the technical words "malice aforethought," which were essential in an indictment at common law, should be used. Cox v. People, 80 N. Y. 500.

The words "falsely and maliciously," if essential in an indictment for conspiracy, should be used in connection with the act which it is charged was done by the conspirators and not in connection with the allegation of conspiracy. Elkin v. People, 24 How. Pr. (N. Y.) 272.

In England in an indictment for libel under 6 and 7 Vict., chap. 96, § 5, it is not necessary to aver malice. Reg v. Munslow (1895), 1 Q. B. 758, 64 L. J. M. C. (N. S.) 138. 24. Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544.

25. Aikman v. Commonwealth, 13 Ky. Law Rep. 894, 18 S. W. 937, so holding in the case of an indictment,

for arson. See also Commonwealth v. Carson, 166 Pa. St. 179, 30 Atl. 985, holding that an indictment under Pa. Act, April 22, 1863, P. L. 531, for "wilfully and maliciously" entering a building was not defective by reason of the use of the word "feloniously" in place of wilfully.

But see Maxwell v. State, 68 Miss. 339, 8 So. 546.

26. United States. — United States v. Edward, 43 Fed. 67.

**Arkansas.**—Casey v. State, 53 Ark. 334, 14 S. W. 90.

California. — Pecple v. Turner 122 Cal. 679, 55 Pac. 685.

Florida.—Savannah F & W. R. Co. v. State, 23 Fla. 579, 3 So. 204.

Maine.—State v. Hussey, 60 Mc. 410, 11 Am. Rep. 209.

**Missouri.**—State v. Day, 100 Mo. 242, 12 S. W. 365.

New Hampshire.—State v. Gove, 34 N. H. 510.

Tennessee.—Morrow v. State, 10 Humph. 120.

Wisconsin.—State v. Delue, 2 Pinn. 204. literal language of the act in framing indictments for statutory offenses it is essential that either the same word, or words of equivalent meaning, and substantially synonymous, should be used.27 So it is said "It is undoubtedly safer to follow the language of the statute in describing the offense charged in the indictment. But it has been repeatedly held that words equivalent in their meaning to those in the statute may be used. So, the use of words of more general signification, but clearly including in their meaning all that is embraced in the language of the statute has received, in many instances, judicial sanction. But wherever there is a change of phraseology, and a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than, and includes it, the indictment will be sufficient."28 In this connection the word "maliciously" has been held sufficient in an indictment though the statute uses the word "wilfully," it being declared that the word "malice" implies wilfulness.29 So the word "feloniously" instead of "wilfully" has been held sufficient.30 And it has been held that an indictment charging that "the defendant did unlawfully, feloniously, and maliciously, with intent to kill, cut and wound" a certain person is sufficient though the word wilfully is used in the statute, it being declared in this case that the words used import an exercise of the will, and convey the same idea as the words of the statute.31 Again where the statute makes it a felony where one wilfully and maliciously does a certain act an indictment thereunder will be sufficient though the word "wilfully" is omitted in the accusatory part if, as to the mode of committing

<sup>27.</sup> Harrington v. State, 54 Miss. 490. Per Chalmers, J.

<sup>28.</sup> State v. Robbins, 66 Me. 324, 328. Per APPLETON, J.

<sup>29.</sup> State v. Robbins, 66 Me. 324, wherein it is said: "A man may do an act wilfully and yet be free of malice. But he cannot do an act maliciously without at the same time doing it wilfully. The malicious do-

ing of an act includes the wilful doing of it. Malice includes intent and will." Per APPLETON, J.

See also Funderbunk v. State, 75 Miss. 20, 21 So. 658.

**<sup>30</sup>**. State v. McDaniel, 45 La. Ann. 686, 12 So. 751.

<sup>31.</sup> Flinn v. Commonwealth, 81 Ky. 186, 23 S. W. 346.

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the offense, it is charged that it was done "wilfully."<sup>32</sup> But though words of similar meaning may be used it is said that it is safer to pursue strictly the words of the statute in such cases than to attempt to resort to such words.<sup>33</sup>

§ 331. Averments as to wilfulness of act - When insufficient. -The word "unlawfully" is not one of equivalent signification with "wilfully." The latter word, used in a statute making an act so done a criminal offense, is descriptive of the offense thereby created and necessarily implies that the act shall be done knowingly and of purpose which is not expressed by the word unlawfully.34 So the words "unlawfully and maliciously" used in charging an offense under a statute making it criminal to do the act, "willfully and maliciously" are not an equivalent of the latter words. 35 And where a statute makes criminal the doing of an act "wilfully and maliciously," an indictment thereunder has been held insufficient which charges that the act was done "feloniously and unlawfully," the latter term not being synonymous, equivalent, of the same legal import, or substantially the same as the former.36 Again where the statute defines the offense as consisting in "wilfully and maliciously killing," an indictment is not sufficient which charges that the killing was "felonious, unlawful

32. Toler v. Commonwealth, 14 Ky. 529, 23 S. W. 347.

33. State v. Delue, 2 Pinn. (Wis.) 204. It was said in this case: "Although the ancient strictness in framing indictments is, in many instances, relaxed, yet where an indictment is grounded upon such a statute, we think it a safe rule of practice to pursue strictly the words of the statute in charging the offense." Jer JAOKSON, J.

See also State v. Robbins, 66 Me. 324; Barthelow v. State, 26 Tex. 175. 34. Morrow v. State, 10 Humph. (Tenn.) 120.

35. State v. Hussey, 60 Me. 410, 11 Am. Rep. 209. The court said:

"Unlawfully doing a thing is not synonymous with wilfully doing it. A man may do many things wilfully which are not unlawful, and he may do many things unlawfully which are not wilfully done." Per APPLETON, J. See also Rex v. Davis, 1 Leach, 556.

36. State v. Gove, 34 N. H. 510. The court said: "There can be no doubt that the words wilfully and maliciously,' in the statute under consideration, are descriptive of the offense defined—are an essential part of that description. The burning must be wilful and malicious—done with a wilful and malicious intent—or the statute offense is not committed." Per Fowler, J.

and malicious."<sup>37</sup> And where a statute provides that one shall be guilty of perjury who, after having taken an oath, "wilfully and contrary to such oath, states as true any material matter which he knows to be false," an indictment thereunder which omits such words in the charging part is fatally defective.38 So in an early English case where it was charged in the indictment that the defendant "then and there falsely and maliciously" gave false testimony it was held on a motion in arrest of judgment that the indictment was bad in not averring that the defendant wilfully and corruptly swore falsely,39 and a similar conclusion has been reached in the Federal courts. 40 And it is said in reference to the offense of perjury, that "at common law, where wilfulness was an essential element of the crime, and in all the States of this country which by statute have adopted a definition of the crime making wilfulness an element thereof, it is held uniformly and without exception, that the defendant must be charged with wilful false swearing, and the wilfulness of the act must be proved."41

§ 332. Allegation that offense unlawfully done — Necessity and sufficiency of.—Where the offense charged is an offense at common law, and is itself manifestly illegal, the averment that it was done unlawfully is not necessary. And it has been declared that when the fact laid in an indictment appears to be unlawful, it is not necessary to allege it to have been unlawfully

37. State v. Delue, 2 Pinn. (Wis.) 204. It was said in this case: "Such a departure from the language of the statute, in charging the offense committed, is unauthorized by any of the standard authorities upon criminal law." Per Jackson, J.

38. People v. Turner, 122 Cal. 679, 55 Pac. 685.

39. People v. Turner, 122 Cal. 679, 55 Pac. 685.

40. United States v. Stevens, 43 Fed. 67.

**41**. People v. Turner, 122 Cal. 679, 55 Pac. 685.

42. State v. Hodges, 55 Md. 127. Per ROBINSON, J., citing 1 Chitty Crim. Law, 160; 2 Hawk P. C., § 25. See also Barnard v. State, 88 Wis. 656, 60 N. W. 1058.

In an indictment for murder the word "unlawful" need not be used. Jerry v. State, 1 Blackf. (Ind.) 395. It is not necessary to charge that the killing was "unlawfully" done. Hunter v. State, 30 Tex. App. 314, 17 S. W. 414; Hall v. State, 28 Tex. App. 146, 12 S. W. 739; Jackson v. State, 25 Tex. App. 314, 7 S. W. 872.

done, unless it be a part of the description of the offense, as defined by statute.<sup>43</sup> But even though the statute uses the word "unlawful" it is not absolutely essential that the word "unlawful" or "unlawfully" should be used in an indictment under the statute. So where the word "feloniously" was used in an indictment instead of the word "unlawful," as used in the statute, it was held sufficient, the former word being said to be of much more force and more comprehensive meaning than the latter.<sup>44</sup> And it has also been decided that an indictment which contains the words "injuriously and wrongfully" instead of the word "unlawfully" is sufficient.<sup>45</sup>

§ 333. Charging that act was "feloniously" done.—In charging a felony at common law it was a general rule that the word "feloniously" or its equivalent was essential to the sufficiency of the indictment and in the absence of a statute to the contrary, this is also the rule in regard to the charging of an offense which is a felony by statute. 46 So an indictment for an assault with intent

**43**. Commonwealth v. Twitchell, 4 Cush. (Mass.) 74. See State v. Martin, 107 N. C. 904, 12 S. E. 194.

An indictment under the game laws in Maine need not allege act was done "unlawfully." State v. Tibbetts, 86 Me. 189, 29 Atl. 979.

An indictment for receiving stolen goods should contain an averment that the goods were unlawfully received. State v. Hodges, 55 Md. 127.

44. Franklin v. State, 108 N. C. 47, 8 N. E. 865. See also Greer v. State, 50 Ind. 267, 19 Am. Rep. 709; State v. Miller, 190 Mo. 449, 89 S. W. 377, holding it sufficient where it is alleged that the acts charged were committed by the defendant knowingly, wilfully and feloniously.

**45**. State v. Vermont R. R. Co., 27 Vt. 103.

46. Arkansas.—State v. Eldridge, 12 Ark. 608.

Illinois.—Bolen v. People, 184 Ill. 338, 56 N. E. 408; Ervington v. People, 181 Ill. 408, 54 N. E. 981.

**Iowa.**—State v. Judd, 132 Iowa, 296, 109 N. W. 892; State v. Andrews (Iowa), 50 N. W. 549.

**Kentucky.**—Kaelin v. Commonwealth, 84 Ky. 354, 1 S. W. 594; Hall v. Commonwealth, 15 Ky. Law Rep. 856, 26 S. W. 8; Jane v. Commonwealth, 3 Metc. 18.

Mississippi.—Bowler v. State, 41 Miss. 540; Sarah v. State, 28 Miss. 267.

Missouri.—State v. Feazell, 132 Mo. 176, 33 S. W. 758; State v. Rector (Mo.), 23 S. W. 1074; State v. Herrill, 97 Mo. 105, 10 S. W. 387; State v. Terry, 30 Mo. 368; State v. to commit a rape has been held insufficient where it omitted the word "feloniously" in the description of the offense, <sup>47</sup> as has also an indictment for rape, <sup>48</sup> for false pretenses, <sup>49</sup> and for other offenses which are felonies. <sup>50</sup> And in an indictment for the common law crime of murder it is decided that the indictment must charge in positive language that the mortal wound was feloniously inflicted, and it is said that this may be done by so arranging the language as to make the word "feloniously" used in charging the assault, modify the different acts constituting the crime, or it may be repeated in the different portions of the indictment. <sup>51</sup> This principle as to the necessity of repeating the word feloniously is sustained by numerous decisions in indictments for other offenses. <sup>52</sup> But where the gravamen of the offense created by the

Feaster, 25 Mo. 324; State v. Gilbert, 24 Mo. 380.

Montana.—State v. Rechnitz, 20 Mont. 488, 52 Pac. 264.

New York.—People v. Fish, 4 Park. Cr. R. 206.

North Carolina.—State v. Caldwell, 112 N. C. 854, 16 S. E. 1010; State v. Bryan, 112 N. C. 848, 16 S. E. 909.

Pennsylvania. — Commonwealth v. Schall, 12 Pa. Co. Ct. 554.

Texas.—Cain v. State, 18 Tex.

West Virginia.—State v. Whitt, 39 W. Va. 468, 19 S. E. 873.

It is not an indictment for a felony where the act is not charged to have been done "feloniously." State v. Whitt, 39 W. Va. 468, 19 S. E. 873. Such an indictment only charges a misdemeanor. Commonwealth v. Schall, 12 Pa. Co. Ct. R. 554.

That other words will not supply the omission of the words "feloniously" or "with felonious intent," see Kaelin v. Commonwealth, 84 Ky. 354, 1 S. W. 594.

47. State v. Scott, 72 N. C. 461, citing and approving State v. Johnson, 67 N. C. 55, and holding that the indictment should charge the assault with intent, etc., "feloniously to ravish and carnally know."

Compare Territory v. Godfrey, 6 Dak. 46, decided under Dak. Pen. Coae, § 292.

**48.** Hall v. Commonwealth, 15 Ky. Law Rep. 856, 26 S. W. 8.

**49.** State v. Caldwell, 112 N. C. 854, 16 S. E. 1010; State v. Bryan, 112 N. C. 848, 16 S. E. 909.

50. See cases in first note to this section.

**51**. Wright v. United States (Okla. 1907), 90 Pac. 732.

Must charge act was done "feloniously" in indictment for murder.—Ervington v. People, 181 Ill. 408, 54 N. E. 981; State v. Andrews, 84 Iowa, 88, 50 N. W. 549; Kaelin v. Commonwealth, 84 Ky. 354, 1 S. W. 594; State v. Rector (Mo.), 23 S. W. 1074; State v. Herrell, 97 Mo. 105, 10 S. W. 387.

52. United States.-St. Clair v.

statute was the felonious obtaining of goods by false and fraudulent representations and statements, and these facts were sufficiently averred in the indictment, it was decided that the indictment was sufficient though it did not expressly allege that the defendant "feloniously intended" to commit the crime.<sup>53</sup> In this connection it was said in an early case by the United States Supreme Court that in cases where felonious intent constitutes no part of the crime, that being complete, under the statute, without it, and depending upon another and different criminal intent, the rule at common law as to charging that the act was feloniously done, can have no application in reason, however it may be upon authority.<sup>54</sup> Where, however, the word "feloniously" is one which is essential to the sufficiency of an indictment, an amendment inserting such word in the indictment will not be permitted.<sup>55</sup>

§ 334. Use of words "unlawful" or "felonious" in indictments for misdemeanors.—In the case of misdemeanors where the fact laid in the indictment appears to be unlawful it is unnecessary to allege it to be unlawfully done, it being said that such an averment is in no case essential unless it be a part of the description of the offense as defined by some statute, for if the fact as stated be illegal, it would be superflous to allege it to be unlawful. And it has been decided that where an offense which was a misdemeanor at common law is made a felony by statute it is not necessary to allege that the act was feloniously done. And as a general rule the use of the word "feloniously" in charging a misde-

United States, 154 U. S. 134, 38 L. Ed. 936, 12 Sup. Ct. 1002.

Indiana.—Holland v. State, 131 Ind. 568, 31 N. E. 359.

Montana.—See State v. McCaffery, 16 Mont. 33, 40 Pac. 63.

North Carolina.—State v. Owen, 1 Murph. 452.

**Utah.**—People v. Davis, 8 Utah, 412, 32 Pac. 670.

**53**. State v. Turley, 142 Mo. 403, 44 S. W. 267.

54. United States v. Staats, 8 How. (U. S.) 41, 45. Per Nelson, J., cited and followed in Bannon v. United States, 156 U. S. 464, 15 Sup. Ct. 467. See also State v. Felch, 58 N. H. 1.

55. State v. Durbin, 20 La. Ann. 409.

56. Capps v. State, 4 Iowa, 502.

57. Butler v. State, 22 Ala. 43; Beasley v. State, 18 Ala. 535. See § 333 herein as to necessity of charging statutory offense to have been "feloniously" done.

meanor is no ground for quashing the indictment,<sup>58</sup> but in such a case the word "feloniously" may be rejected as surplusage.<sup>59</sup>

§ 335. Knowledge—When necessary to aver.—Where knowledge is an ingredient of the offense it is essential that there should be an averment thereof. In the application of this rule it is decided that in an indictment for obstructing a public officer in the performance of his duties, knowledge of his official character should be alleged. And to charge a person as accessory it is said that knowledge of the commission of a crime is, and always has been, necessary. And in an indictment against a justice of the peace for wilful misdemeanor in office there should be an averment that the act was done knowingly and corruptly. An averment of

58. State v. Sparks, 78 Ind. 166; State v. Staton, 88 N. C. 654, citing State v. Slagle, 82 N. C. 653; State v. Upchurch, 9 Ired. L. (N. C.) 454.

59. Commonwealth v. Philpot, 130 Mass. 59; Commonwealth v. Squire, 1 Metc. (Mass.) 258; State v. Crummey, 17 Minn. 72; Lohman v. Restell, 1 N. Y. 379; Hess v. State, 5 Ohio, 5.

60. United States. — United States v. Nathan, 61 Fed. 936.

Alabama.—Stein v. State, 37 Ala. 123.

California.—People v. Smith, 103 Cal. 563, 37 Pac. 516; Ex parte Goldman (Cal. App. 1906), 88 Pac. 819.

Indiana.—State v. Ross, 4 Ind. 541.

Kentucky. — Commonwealth v Stout, 7 B. Mon. 247.

Michigan.—People v. Fitzgerald, 92 Mich. 328, 52 N. W. 726; People v. Behee, 90 Mich. 356, 51 N. W. 515.

**Mississippi.**—Gates v. State, 71 Miss. 874, 16 So. 342.

Missouri.—State v. Gardner, 2 Mo. 23.

Ohio.—Birney v. State, 8 Ohio, 230; Gatewood v. State, 4 Ohio. 386.

South Carolina.—State v. Brown, 2 Speers L. 129.

Virginia.—Commonwealth v. Israel, 4 Leigh, 675.

England.—Reg v. Philpots, 47 Eng. Com. Law, 112.

It is competent evidence in order to show a scienter on the trial of an indictment for uttering a forged note, to prove that the prisoner uttered another forged note of the same bank on the same day, although he had been acquitted on a trial for that offense. State v. Robinson, 16 N. J. L. 507.

61. State v. Maloney, 12 R. I. 251.

Knowledge that person assaulted was an officer is a necessary averment in an indictment for the aggravated offense of assault upon an officer in the lawful discharge of his duties. Johnson v. State, 26 Tex. 117. See Commonwealth v. Kirly, 2 Cush. (Mass.) 577, as to sufficiency of averment of knowledge.

62. Ex parte Goldman (Cal. App. 1906), 88 Pac. 819.

63. State v. Gardner, 2 Mo. 23. See State v. Ross, 4 Ind. 541.

knowledge is also essential in an indictment for uttering a forged instrument.<sup>64</sup> And where an indictment is brought against one for obtaining money by false pretenses it is held essential to its sufficiency that there should be an averment that the accused knew the representations were false or that they were false in fact.<sup>65</sup> So it has been said that "where one is indicted for selling an obscene book, or for an indecent exposure of the person, or for keeping and suffering to go at large a dog of ferocious and furious nature, or for bringing into a public place an animal or person infected with a communicable disease, or for selling unwholesome meat, or for selling a diseased cow, or for uttering a forged note, or for any offense of like character, it is held that an averment of knowledge is necessary."<sup>66</sup>

§ 336. Knowledge — When not necessary to aver.—It is a generally accepted rule that where the statement of the act, necessarily includes a knowledge of the illegality of the act, no averment of knowledge is required.<sup>67</sup> It is not necessary to allege

**64.** People v. Smith, 103 Cal. 563, 37 Pac. 516; Gates v. State, 71 Miss. 874, 16 So. 342.

65. People v. Behee, 90 Mich. 356, 51 N. W. 515.

**66.** Stein v. State, 37 Ala. 123, 133. Per WALKER, J.

67. United States. — United States v. Debs, 65 Fed. 210; United States v. Holmes, 40 Fed. 750; United States v. Jolly, 37 Fed. 108.

Alabama.—Stein v. State, 37 Ala. 123.

**Kentucky.** — Commonwealth v. Stout, 7 B. Mon. 247.

Massachusetts.—Commonwealth v. Raymond, 97 Mass. 567.

South Carolina.—State v. Brown, 2 Speers L. 129.

**Vermont.**—State v. Carpenter, 20 Vt. 9.

An indictment against s

house, as a dram shop and nuisance, when a lien is not sought on the property, need not aver the owner's knowledge of the unlawful traffic. Our House No. 2 v. State, 4 G. Greene (Iowa), 172.

An indictment under the Elkins Act (Act Feb. 19, 1903, chap. 708, 32 Stat. 847; U. S. Comp. St. Supp. 1905, p. 599), where all the acts constituting such offense took place prior to the passage of the Hepburn Law (Act June 29, 1906, chap. 3591, § 10, 34 Stat. 584), which was found after the passage of the latter bill, held sufficient, though it did not allege that the giving of the rebates was done "knowingly," though such allegation would be necessary under the latter law. United States v. Delaware, L. & W. R. Co., 152 Fed. 269.

knowledge where the case is one in which the defendant is bound to know the facts and obey the law at his peril, as in the case of laws against the sale of intoxicating liquor or adulterated milk, and many other police, health and revenue regulations. And this is declared to be the general rule where acts which are not mala in se are made mala prohibita from motives of public policy, and not because of their moral turpitude or the criminal intent with which they are committed. So in an early case in South Carolina it is said: "A scienter is never necessary to be alleged, except when the crime is not complete, without some extrinsic circumstance within the prisoner's knowledge, as in cases of aiding a prisoner to escape, uttering a forged note or bill, and cases of that description, where, without the scienter, the act is free from guilt."

§ 337. Knowledge — Necessity of averring — Statutes.— Where by statute knowledge is an essential element of the offense, it is essential to the validity of an indictment that there should be an averment of knowledge therein in the description of the offense. And where the language of the statute is general but is intended to include only those who had knowledge, it is essential

Indictment of bankrupt for concealing money, belonging to his estate, from trustee. An indictment for such an offense which avers that the accused did unlawfully, knowingly, wilfully and fraudulently conceal from his trustee certain property belonging to his estate in bankruptcy, and which said property was in his hands and possession, sufficiently charges that the accused knew that the property he was charged with concealing belonged to his estate in bankruptcy. McNiel v. United States, 150 Fed. 82 (C. C. A.).

68. Commonwealth v. Raymond, 97 Mass. 567. Per FOSTER, J., citing 3 Greenl. Ev., § 21; Commonwealth v. Boynton, 2 Allen (Mass.), 160; Commonwealth v. Farren, 9 Allen (Mass.),

489; Commonwealth v. Waite, 11 Allen (Mass.), 264. See also Commonwealth v. Sellers, 130 Pa. St. 32, 18 Atl. 541.

69. State v. Brown, 2 Speers L. (S. C. 129. Per Evans, J.

70. United States. — United States v. Carll, 105 U. S. 611; United States v. Watkinds, 6 Fed. 152.

Alabama.—Davis v. State, 68 Ala. 58, 44 Am. Rep. 128.

California.—People v. Mitchell, 92 Cal. 590, 28 Pac. 597.

Indiana.—Powers v. State, 87 Ind. 97.

Massachusetts.—Commonwealth v. Boynton, 12 Cush. (Mass.) 499.

Mississippi.—Gates v. State, 71 Miss. 874, 16 So. 342.

that knowledge should be averred.<sup>71</sup> So in the case of a sale of diseased meat or impure food, prohibited by statute, the statute is to be construed as limiting the general words to cases where the accused had knowledge of the quality of the article, and it is not in all cases sufficient to charge the offense in the language of the statute.<sup>72</sup>

§ 338. Sufficiency of averment of knowledge.—It is not necessary that the word "knowingly" should be used to aver knowledge, the use of other words having the same meaning being sufficient. So the use of the words "well knowing" has been held to be a sufficient allegation of knowledge, as had also the use of the word "secretly," and "unlawfully." And an indictment charging that the defendant "did wilfully, unlawfully, and knowingly, and with intent to defraud the revenues of the United States, smuggle and clandestinely introduce into the United States" prepared opium, sufficiently alleges scienter. And it has been decided that the word "knowingly" is not necessary to an indict-

Ohio.—Gatewood v. State, 4 Ohio, 386.

Virginia. — Bailey v. Commonwealth, 78 Va. 19.

71. Schmidt v. State, 78 Ind. 41.

72. Schmidt v. State, 78 Ind. 41.

73. Commonwealth v. Hulbert, 12 Metc. (Mass.) 446, holding under a statute providing that it should be an offense "if any person shall designedly, by any false pretence, and with intent to defraud, obtain from any other person any money or any goods," that an indictment was sufficient which charged that the defendant "designedly and unlawfully did falsely pretend," etc.

Sufficiency of averment of knowledge.—Hester v. State, 103 Ala. 83, 15 So. 857 (indictment for receiving and concealing stolen goods); Commonwealth v. Devine, 156 Mass.

224, 29 N. E. 515 (indictment for subornation of perjury).

74. Huggins v. State, 41 Ala. 393.

75. Sutton v. State, 9 Ohio, 133, holding that an averment that a defendant secretly kept instruments for counterfeiting sufficiently showed a scienter.

76. United States v. Bardenheier, 49 Fed. 846, so holding in the case of an information charging the unlawful altering and changing of revenue stamps.

77. Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325. Mr. Justice Brewer said: "The language of the indictment quoted excludes the idea of any unintentional and ignorant bringing into the country of prepared opium upon which the duty had not been paid, and is satisfied only by proof that such bringing in was

ment because used in a statute where it is there used in reference to the proof.<sup>78</sup> Again where a defendant is charged with "knowingly" depositing in the post office an obscene letter the word "knowingly" will be regarded as qualifying the full act charged to be done and is not limited to the mere act of depositing in the post office. And in such a case an objection that it is not averred that the defendant had knowledge of the contents of the letter or envelope placed by him in the post office will not be sustained.<sup>79</sup>

§ 339. Setting out instrument or writing as basis of prosecution.—In the application of the general rule requiring criminal charges to be preferred with certainty it is decided that the act or instrument, or both, constituting the basis of prosecution, should be described with certainty, where it is in the power of the grand jury or other accusing tribunal to thus describe it or them, and that where it is not, such fact should be stated in the official accusation, as an excuse for want of certainty.<sup>80</sup> And it is declared that by all rules of pleading, criminal as well as civil, when a

done intentionally, knowingly and with intent to defraud the revenues of the United States. Indeed, the word 'smuggling,' as used, carries with it the implication of knowledge."

78. Robeson v. State, 3 Heisk. (Tenn.) 266.

79. United States v. Nathan, 61 Fed. 936.

80. Whitney v. State, 10 Ind. 404. "It is a well settled rule of the common law pleading that when the words of a document are essential ingredients of an offense as in forgery, passing counterfeit money, selling lottery tickets, sending threatening letters, libel (Whart. Cr. Pl. & Pr., § 167, 8th ed.), or a challenge to fight, or for printing, publishing or distributing obscene papers (Commonwealth v. Tarbox, 1 Cush. [Mass.]

66, 66n), the document should be set out in words and figures." People v. Wise, 3 N. Y. Cr. R. 303. Per Nort, J.

In an indictment for forgery the instrument forged should be set out either with particularity, as was required by the earlier cases (United States v. Smith, 2 Cranch C. C. 111; United States v. Peacock, 1 Cranch C. C. 215; Zellers v. State, 7 Ind. 659; People v. Kingsley, 2 Cow. [N. Y.] 522; People v. Wise, 3 N. Y. Cr. R. 303), or in substance, the latter mode being generally regarded as sufficient (State v. Callahan, 124 Ind. 364, 24 N. E. 732; State v. Sherwood, 41 La. Ann. 316, 6 So. 529; Ferguson v. State, 25 Tex. App. 451, 8 S. W. 479; Hardin v. State, 25 Tex. App. 74, 7 S. W. 534; State v. Henderson, 29 W. Va. 147, 1 S. E. 225). The substance and effect of the instrument should be written document is relied on to sustain the prosecution or plaintiff's case, it must be set out either verbatim or in substance, and not a statement of the opinion of the pleader as to the effect it was

so set out in an indictment for forgery that the court may see that it was such an instrument, that the forgery of it would constitute a crime. Wallace v. People, 27 Ill. 45.

In an indictment for forging an instrument in a foreign language there should be a count in the indictment containing an English translation of the instrument. So in an early English case, where the prisoner had been convicted of forging an instrument (purporting to be a Prussian treasury note) in a foreign language, judgment was arrested on the ground that there was no count in the indictment containing such a translation. King v. Goldstein, 7 Eng. Com. Law, 685.

The English precedents for libel, as well as in most of the States of the Union, require the libelous matter to be stated in full in the indictment, that the court may determine whether the article is libelous. McNair v. People, 89 Ill. 441.

The oath, in an indictment for perjury in the taking of an oath by an insolvent, on presenting his petition for a discharge, may be set forth in substance, and where it is set forth to be "in substance and to the effect following, to wit," an exact recital is not necessary. People v. Warner, 5 Wend. (N. Y.) 271.

An affidavit on which a perjury charge is based need not be set out in haec verba under a statute providing that only the substance of the offense need be charged and that an affidavit, deposition or certificate need not be set forth (United States v. Law, 50 Fed. 915, decided under U. S. Rev. Stat., § 5396). So in New York it is held that such an affidavit need be set forth only in substance and effect under Code Crim. Proc., § 291 (People v. Ostrander, 19 N. Y. Supp. 328, 45 N. Y. St. R. 559).

If a count in an indictment for perjury undertake to set out continously the substance and effect of what the defendant swore when examined as a witness, it is necessary in support of such a count to prove that in substance and effect he swore the whole of that which is thus set out as his evidence, though the count contains several distinct assignments Rex v. Leese, 2 Camp. of perjury. 134, wherein Lord Ellenborough said: "It is essential to the security of innocence that words set out in the record should be either literally or substantially proved."

Where the larceny of a railroad ticket of a certain value is charged it is held that the information charging it is demurrable where it does not show that it was signed dated and stamped so as to make it effective. State v. Holmes, 9 Wash. 528, 37 Pac. 283.

An indictment charging the defendant with having a counterfeit bank note in his possession with intent to pass it has been held sufficient, though the bank note is not set forth in the indictment and no reason for the omission is stated.

intended to or might produce.<sup>81</sup> But where the writing or instrument is merely collaterally connected with the offense and is not the basis of the prosecution it is not necessary to set it out.<sup>82</sup>

§ 340. Same subject - Where writing lost, destroyed or in nands of defendant.—In some cases it may happen that the writing is lost, destroyed or in the hands of the defendant and where such a condition exists a failure to set out the writing in an indictment based thereon will be excused by a proper averment setting forth the reason for such failure, in which case also the instrument should be so described in general terms, at least, as to show the offense charged.83 So in an indictment for forgery it is a general rule that the instrument forged should be particularly described, but if it is in the hands of the defendant, or lost or destroyed by him, the indictment may show this excuse, and set forth the instrument in general terms, if it contains enough to show the offense.84 And though an indictment for passing counterfeit money purports to set forth the counterfeit note according to its tenor, and contains no averment of its loss or destruction, the production of the same may be dispensed with upon proof that it has been mutilated or destroyed by the defendant, and other evidence of its contents may be omitted.85

Tomlinson v. People, 5 Park. Cr. (N. Y.) 313.

In some States statutes dispense with the necessity of setting out a copy. Roberts v. State, 72 Miss. 110, 16 So. 233; State v. Wright, 9 Wash. 96, 37 Pac. 313.

81. United States v. Watson, 17 Fed. 145, 149. Per Hill, J.

The legal effect of an instrument may be stated without using the words found upon the face of the instrument. United States v. Keen, 26 Fed. Cas. No. 15,510, 1 McLean, 429: United States v. Peacock, 1 Cranch C. C. 215.

82. Musgrave v. State, 133 Ind.

297, 32 N. E. 885, so holding in the case of an indictment charging a conspiracy to defraud an insurance company by falsely pretending that the person insured was dead. In this case it was held unnecessary to set out the insurance policy.

83. United States v. Howell, 40 Fed. 110; People v. Kingsley, 2 Cow. (N. Y.) 522, 14 Am. Dec. 520.

84. People v. Kingsley, 2 Cow. (N. Y.) 522, 14 Am. Dec. 520. See State v. Potts, 9 N. J. L. 26.

85. State v. Potts, 9 N. J. L. 26. See United States v. Howell, 64 Fed. 110.

§ 341. Same subject - Attaching instrument to indictment. -In some cases instead of setting out an instrument in the body of the indictment it may be permissible to attach it to the indictment as an exhibit, reference thereto being made in the body of the indictment. Such a practice, however, is not regarded with favor in the courts and has been declared to be loose and objectionable and not to be encouraged.86 And in a case in which the question of the sufficiency of an indictment under such circumstances arose. the court said: "This practice of attaching a copy of an instrument as an exhibit, instead of incorporating it into the body of the indictment, is certainly novel in criminal pleading. It is a very loose and dangerous practice, and certainly ought not to be encouraged. It is, of course, quite common in civil pleadings, but when we consider the liability of an exhibit to become detached, and the difficulty of properly and conclusively identifying it, such a practice ought not to obtain in criminal pleading. If an indictment in this form is presented to the court, we think it would be eminently proper for him on his own motion to refuse to receive it, and to return it to the grand jury with instructions to have it drawn in better form; and we are not now prepared to say that, if the objection were raised by a defendant upon arraignment, by motion to set aside the indictment, the court would not be justified in granting the motion and resubmitting the case to the grand jury. But, as against a demurrer, we can see no principle of law upon which we can hold that an exhibit attached to an indictment, and referred to in it as attached thereto, and marked and expressly made a part thereof, should not be considered a part of the indictment, the same as if incorporated in the body of the pleading."87

§ 342. Same subject — Where word in instrument uncertain or illegible.—Where in setting forth an instrument any uncertainty arises in a name or a word, which is material, it is essential that such uncertainty should be rendered certain by suitable aver-

86. State v. Williams, 32 Minn. 537, 21 N. W. 746, so holding where to an indictment for the fraudulent sale of mortgaged personal property

was attached a copy of the mortgage.

87. State v. Williams, 32 Minn.

537, 21 N. W. 746. Per MITCHELL, J.

ments.<sup>88</sup> So where an indictment attempts to set out obscene matter, the fact that it omits some parts will not vitiate the indictment where it is alleged that the omission is due to the fact that such parts are illegible.<sup>89</sup>

§ 343. Same subject — Effect of mistake.—A mistake in setting forth an instrument will not vitiate the indictment where the variance between the instrument as set forth and that offered in evidence is not a material one. So where an indictment purported to set forth a copy of a deed and the deed offered in evidence on the trial showed that in the copy in the indictment the easterly and westerly boundary lines were omitted, but the copy showed inferentially the length of these lines, it was held that the variance was not material.90 So in this connection it has been said: "The general rule of criminal pleading, when the tenor of a writing is required to be set forth, as in forgery and in libel, is, that the indictment should contain an exact copy. From the older cases it appears that this requirement was originally enforced with great strictness. But in the more modern practice this severity has been, in several instances, somewhat moderated, so that now we find the law stated in the text books, as extracted from the reports, to the effect that the variance of a letter between the instrument produced and the tenor of the record will not be fatal, provided the meaning be not altered by changing a word into another of a different signification."91

§ 344. Same subject — What may be omitted.—In an indictment for forgery alleging an instrument to be in the words and

88. United States v. Keen, 26 Fed. Cas. No. 15,510, 1 McLean, 429.

The meaning of mis-spelled words in an instrument alleged to be a forgery may be properly set forth by inuendo averments in the indictment. Colter v. State, 40 Tex. Cr. 165, 49 S. W. 379.

89. Thomas v. State, 103 Ind. 419,2 N. E. 808. See Fomby v. State, 87

Ala. 36, 6 So. 271, as to when parts of an instrument are illegible.

90. Webster v. People, 92 N. Y. 422, holding also that the omission to allege in the indictment that the deed was under seal was not a material defect.

91. State v. Jay, 34 N. J. L. 368. Per Beasley, J.

## § 345 CHARGING THE OFFENSE—PARTICULAR AVERMENTS.

figures following, it has been decided that a strict recital is necessary, but that the number of a bill, and the figures in its margin making its amount, are not parts of the bill and need not be set out in the indictment.<sup>92</sup> So in an indictment for forging and uttering a check it is not necessary to set forth indorsements appearing upon the check or a revenue stamp attached thereto. Neither forms part of the check, which is a complete instrument of itself, and such omission therefore does not constitute a variance.<sup>98</sup>

§ 345. Same subject — Obscene publications.—In those cases where a publication is of such an obscene character as to render it improper that it should appear on the record, the statement of the contents may be omitted altogether and a description thereof substituted, in which case it is essential that a reason for the omission

92. Commonwealth v. Bailey, 1 Mass. 62. See also Langdale v. People, 100 Ill. 263, citing Commonwealth v. Stevens, 1 Mass. 203; Griffin v. State, 14 Ohio, 54. See People v. Kingsley, 2 Cow. (N. Y.) 522, 14 Am. Dec. 520, holding that dates, sums and times of payment may be omitted. White v. Territory, 1 Wash. 279, 24 Pac. 447.

Where an indictment set out a part of the vignette or ornaments of a forged bank note and it was objected to on the ground that if the State undertook to set out a part it was bound, as in other cases, to set out the whole, the court declared that it was a sufficient answer to this objection that setting out the whole, or any part of the ornament, whether consisting of letters, words, figures, mottoes, inscriptions or emblems of animate or inanimate things is mere surplusage. State v. Robinson, 16 N. J. L. 507, 510. Per Ford, J.

In an indictment for forging a bill of exchange or bank bill it is not necessary to insert the marks, letters or figures used in the margin of the bill, for ornament or the more easy detection of forgeries, as such marks or ciphers form no part of the People v. Franklin, 3 Johns. bill. Cas. (N. Y.) 299, wherein it was said: "It might as well be required that the water marks and a fac simile of all the engraved ornaments used in a bank bill, for the more easy detection of forgeries, should be inserted in an indictment."

An indictment for counterfeiting need not set out an indorsement upon the counterfeited paper. Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767.

93. Miller v. People, 52 N. Y. 304, citing Hess v. State, 5 Ohio, 9; Commonwealth v. Ward, 2 Mass. 397; People v. Franklin, 3 Johns. Cas. (N. Y.) 299.

appear in the indictment by proper averments,<sup>94</sup> and that there be such a description therein of the publication as to inform the accused what publication is referred to.<sup>95</sup> So it is said that it is now the general American doctrine that the obscene book or paper need not be set out in an indictment, if it be properly described and the indictment contains the averments, that it is so obscene that it would be offensive to the court, and improper to be placed on the records thereof and that therefore the grand jury did not set it forth in the indictment.<sup>96</sup> So in an early case in Michigan it is

94. United States.—Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606.

Massachusetts.—Commonwealthv. Tarbox, 1 Cush. (Mass.) 66; Commonwealth v. Holmes, 17 Mass. 336.

Missouri.—State v. Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627.

**Rhode Island.**—State v. Smith, 17 R. I. 371, 22 Atl. 282.

Vermont.—State v. Brown, 27 Vt. 619.

the English courts the American doctrine is not accepted .- So in a case in which this reason was pointed out it was said: "Another reason is given why an obscene libel should not be set out verbatim in the indictment. The records of the court, it is said, should be kept pure and undefiled. This seems to me a wholly fanciful and imaginary desideratum. And if such an objection is good in the case of an obscene libel, why is it not equally good, or even better, in that of a blasphemous # libel, or an indictment for the use of seditious language? And why is it not also an objection in the case of a libel defamatory of private character? There, if anywhere, it seems to me, it should prevail. What can be more inconvenient and grievous, for instance, ill. 441.

than the perpetration and publication, by means of the record of the court, of a libel charging a man with the commission of an infamous crime? Therefore the objection is a fanciful one." Reg v. Bradlaugh, 38 L. T. Rep. N. S. 118, 121. Per Branwell, L. J. See also Rex v. Carll, 2 Strange, 789; Rex v. Sparling, 1 Strange, 498.

Does not violate constitutional rights.—The constitutional provision securing to an accused person the right to be informed of the nature and cause of the accusation against him is not violated by an omission to set out obscene matter in an indictment, it being alleged that it is not proper to be spread upon the records of the court, where it is sufficiently described. Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606. See § 286 herein.

95. United States v. Clark, 40 Fed. 325; Commonwealth v. McConce, 164 Mass. 162, 41 N. E. 133, 29 L. R. A. 61.

2 N. E. 808. Per ZOLLARS, J., citing Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Sharpless, 2 S. & R. (Pa.) 91; State v. Brown, 27 Vt. 619; United States v. Bennett, 16 Blatchf. 338; McNair v. People, 89 Ill. 441.

said that there is an ancient rule "which forbids the introduction in an indictment of obscene pictures and books. Courts will never allow its records to be polluted by bawdy and obscene matters. do this would be to require a court of justice to perpetuate and give notoriety to an indecent publication, before its author could be visited for the great wrong he may have done to the public or to individuals. And there is no hardship in this rule."97 But though in indictments for publishing an obscene paper it is not always necessary that the contents of the publication should be inserted, yet whenever it is necessary to do so or whenever the indictment undertakes to state the contents it is said that the same rule prevails as in the case of libel, and the alleged obscene publication must be set out in the very words of which it is composed and the indictment must undertake or profess to do so by the use of appropriate language.98 In this connection it has been declared by the United States Supreme Court that whether a matter is too obscene to be set forth in the record is a matter primarily to be considered by the district attorney in preparing the indictment; and, in any event, it is within the discretion of the court to say whether it is fit to be spread upon the records or not.99

§ 346. Same subject — Obscene publications — Qualification of rule as to description — New York case.—In a case in New York the exception is further extended, it being held that where the matter is too obscene to be set out it is sufficient to use such descriptive allegations as will identify the book or publication intended and to also allege that the grand jury deem the matter too obscene and foul to be spread upon the records. The court said: "By the American doctrine and practice on this head . . . the avoiding of obscene allegation in the record, breeding corruption, is a necessity, excusing the setting out of the words. It is claimed, however, that the obscene matter should have been described, at least in general terms. The answer to this is, that if the matter is

<sup>97.</sup> People v. Girardin, 1 Mich. 90. Per Whipple, J.

<sup>98.</sup> Commonwealth v. Tarbox, 1 Cush. (Mass.) 66.

<sup>99.</sup> Dunlop v. United States, 165U. S. 486, 497, 17 Sup. Ct. 375.

People v. Kaufman, 14 App. Div.
 (N. Y.) 305.

too obscene to be set out, it is also too obscene to be properly described. An accurate description of obscene matter, however general, would itself be obscene. Nothing would be gained by condensation. How, indeed, can obscenity be condensed so as to be descriptive and vet sufficiently decent to be placed upon the record? We refer now to such a description as would enable the court, upon the face of the indictment, to determine whether the book or publication is in fact obscene. Any merely general description would not be a description at all—that is, of the obscene words, or matter. A mere description, for instance, of the subject matter-of what, in general, the book is about,-would not be a description of the actual obscenity charged. It would not apprise the defendant of the particular facts upon which the charge is based. It would simply be a means of identifying the book or publication; and that is as well, if not better, effected by stating its title. In none of the cases which have been referred to, with the possible exception of Commonwealth v. Sharpless,2 did the indictment contain a description, either minute or general, of the nature of the obscenity, and in none of them was a descriptive averment of the obscene matter required. The rule to which we have referred is not in conflict with that laid down in People v. Hallenbeck, and People v. Danihy. In neither of these cases was the omission of the obscene matter excused by the statement, in the indictment itself, that it was too gross to be placed upon the record. We agree that, where this excuse is not made by the grand jury upon the face of the indictment, the obscene matter must be set out. Where, however, that excuse is thus made, we think the general rule should be modified in the interest of public decency; and the defendant must then be satisfied with such descriptive allegations as clearly identify the book or publication intended, together with the statement that the obscene matter which the grand jury deem too foul to be spread upon the record is contained therein. If anything more is requisite for the protection of the defendant's rights it may well be left to the discretion of the court to compel the public prosecutor to furnish such further information or specification as may be needful."5

<sup>2. 2</sup> S. & R. (Pa.) 91. 3. 52 How. Pr. (N. Y.) 502.

<sup>4. 63</sup> Hun (N. Y.), 579.

<sup>5.</sup> Per Barrett, J.

§ 347. Same subject — Obscene publications — Effect of statutes.—Though it is provided by statute that an indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury, it is nevertheless necessary to set out the supposed obscene matter in the indictment, unless the obscene publication is in the hands of the defendant or out of the power of the prosecution, or the matter is too gross and obscene to be spread on the records of the court, either of which facts, if existing, should be averred in the indictment, as an excuse for failing to set out the obscene matter.

§ 348. Averments describing personal property — Money.— In those cases where the offense is one affecting the personal property of an individual, as where larceny, embezzlement or the obtaining of property under false pretenses is alleged, a description of the property becomes essential in order that the accused may be informed of the nature and cause of the accusation against him. So property stolen must be described with such certainty as will enable the jury to say whether the chattel proved to have

6. McNair v. People, 89 Ill. 441. Per WALKER, J. See also Reyes v. State, 34 Fla. 181, 15 So. 875.

Florida.—Grant v. State, 35
 Fla. 581, 17 So. 225.

**Georgia.**—Brown v. State, 86 Ga. 633, 13 S. E. 20.

Illinois.—See West v. People, 137 Ill. 189, 27 N. E. 34, 34 N. E. 254.

Indiana.—Whitney v. State, 10 Ind. 404.

Louisiana.—State v. Hoyer, 40 La. Ann. 744, 4 So. 899.

Nebraska.—Barnes v. State, 40 Neb. 545, 59 N. W. 125.

**Pennsylvania.** — Commonwealth v. Seball (Pa. C. P.), 9 Lanc. L. Rev. 332.

Washington.—State v. Brookhouse, 10 Wash. 87, 38 Pac. 862.

Mode of taking advantage of defective description.—A fatal defect in the description of property may be taken advantage of by a demurrer (Roberts v. State, 83 Ga. 369, 9 S. E. 675), or motion in arrest of judgment (Grant v. State, 35 Fla. 581, 17 So. 225; State v. Hoyer, 40 La. Ann. 744, 4 So. 899).

Sufficiency of description of property in particular cases see:

Alahama.—Peters v. State, 100 Ala. 10, 14 So. 896 (larceny of two bales of cotton; description sufficient).

California.—People v. Nesbitt,

been stolen is the same with that upon which the indictment is founded, and as will judicially show to the court that it could

102 Cal. 327, 36 Pac. 654 (obtaining property under false pretenses; description sufficient).

Georgia.—Nightengale v. State, 94 Ga. 395, 21 S. E. 221 (theft of cow; description sufficient); Sanders v. State, 86 Ga. 717, 12 S. E. 1058 (larceny of cattle; description sufficient).

Iowa.—State v. Smith, 88 Iowa, 1, 55 N. W. 16 (larceny of pants; description sufficient).

Kansas.—State v. Hoffman, 53 Kan. 700, 37 Pac. 138 (larceny of four steers; description sufficient).

Louisiana.—State v. Labauve, 46 La. Ann. 548, 15 So. 172 (theft of eight cords of wood; description sufficient); State v. Baden, 42 La. Ann. 295, 7 So. 582 (larceny of one beef; description sufficient).

Maryland.—Foster v. State, 71 Md. 553, 18 Atl. 972 (larceny of bank note; description sufficient); State v. Dowell, 3 Gill. & J. 310 (larceny of one hide; description sufficient).

Michigan.—People v. Price, 74 Mich. 37, 41 N. W. 853 (stealing a yoke of oxen; amendment of description permitted).

Minnesota.—State v. Friend, 47 Minn. 449, 50 N. W. 692 (larceny of horse; description sufficient).

Missouri.—Missouri v. Logan, 1 Mo. 532 (stealing a book; description sufficient).

New Jersey.—Hagerman v. State, 51 N. J. L. 104, 23 Atl. 357 (obtaining goods by false pretenses; description sufficient).

North Carolina.—State v. Bishop, 98 N. C. 773, 4 S. E. 357 (theft of

United States pension agent's check; description sufficient); State v. Wilkerson, 98 N. C. 696, 3 S. E. 683 (obtaining money under false pretenses; description sufficient).

Ohio.—Whiting v. State, 48 Ohio St. 220, 27 N. E. 96 (larceny with count for receiving stolen property).

Tennessee.—State v. Shelton, 90 Tenn. 539, 18 S. W. 253 (breaking and entering a building with intent to steal and carry away goods; not necessary to separately describe articles intended to be stolen); State v. Pearce, Peck. 86 (maliciously killing beast; description sufficient).

Texas.—Walton v. State, 41 Tex. Cr. 454, 55 S. W. 566 (theft of cattle; description sufficient); Lewis v. State, 28 Tex. App. 140, 12 S. W. 736 (misapplication of county funds; description sufficient).

When description not quired .- In indictments for attempts to commit larceny it is said that the same particularity of description of property is not required as in indictments for larceny, and in such a case it has been held sufficient to describe the property as "money, personal goods and chattels." (Clark v. State, 86 Tenn. 511, 8 S. W. 145.) So it is decided that the property intended to be stolen need not be described in an indictment for assault with intent to rob (Crumes v. State, 28 Tex. App. 516, 13 S. W. 868), or in an indictment for burglary with intent to steal. (Lanier v. State, 76 Ga. 304; State v. Jennings, 79 Iowa, 513, 44 N. W. 799. See Reinhold v. State, 130 Ind. 467, 30 N. E. 306.)

## § 348 Charging the Offense—Particular Averments.

have been the subject matter of the offense charged.8 Great particularity in describing articles alleged to have been stolen is not required, but they should be described with reasonable certainty, that is, what is commonly called certainty to a common intent, which is to be construed as meaning such certainty as will enable the court and jury to determine whether the evidence offered in support of the charge relates to the same property on which the indictment was founded, and thus prevent one from being tried for an offense other than that for which the grand jury indicted him, and to enable the defendants to plead the judgment in bar of another prosecution for the same offense.9 So a description of a watch as "one gold watch" has been held sufficient where it is such a watch as is commonly called a gold watch by the public, though it is not considered a gold watch among jewelers. 10 But it is not sufficient to charge a person with having stolen "the goods and chattels" of another with no further description, as such an averment does not comply with the well-settled rule of the common law as to certainty.11 As to statutory offenses the rule as declared by the United States Supreme Court is that if the description brings the property, in respect to which the offense is charged, clearly within the scope of the statute creating the offense, and at the same time so identifies it as to enable the defendant to fully prepare his defense, it is sufficient. 12 These general principles to description of property also apply generally the case of indictments for the larceny of money.13

- People v. Jackson, 8 Barb. (N. Y.) 637.
- 9. State v. Dawes, 75 Me. 51. See People v. Platt, 67 Cal. 21, 7 Pac. 1.
- Pfister v. State, 84 Ala. 432, 4
   395.
  - 11. Merwin v. People, 26 Mich. 298.
    12. Dunbar v. United States. 156
- Dunbar v. United States, 156
   S. 185, 15 Sup. Ct. 325.
- 13. Averments as to money.— In an indictment for stealing bank notes it is sufficient to describe them in the same manner as other things which have an intrinsic value, by any

description applicable to them aschattels. People v. Jackson, 8 Barb. (N. Y.) 637.

It is not necessary to state the number and denomination.—
United States v. Bornemann, 36 Fed.
257; Reed v. State, 88 Ala. 36, 6 So.
840; Malcolmson v. State, 25 Tex.
App. 267, 8 S. W. 468. Compare Barggett v. State, 69 Miss. 625, 13 So. 816.

An indictment for the larceny of bank bills, describing them as "sundry bank bills, of some banks respectively to the said jurors uncase of an indictment charging a larceny of various distinct articles of property, some of which are technically described, and others not so, where a general verdict of guilty is found by the jury, it is said to be well settled that the insufficiency of the description as to certain articles has no other effect than to strike them out of the indictment, and the verdict is to be applied to the whole property which is properly and sufficiently charged to have been stolen, and for the larceny

known, of the amount and value in all of thirty-eight dollars, of the property, goods and chattels" of a person named, held sufficient. Commonwealth v. Grimes, 10 Gray (Mass), 470, 71 Am. Dec. 666.

In larceny of silver coins the general form of charging the offense as a larceny of "sundry pieces of silver coin, amounting together to the sum of," followed by the amount, without describing each piece of coin, is sufficient. Commonwealth v. Grimes, 10 Gray (Mass.), 470, 71 Am. Dec. 666.

By statute it may be unnecessary to specify any particular coin, it being sufficient to charge the larceny, embezzlement or fraudulent disposition of a sum of money, lawful currency of the United States. Travis v. Commonwealth, 16 Ky. Law Rep. 253, 27 S. W. 863; Commonwealth v. Mann, 12 Ky. Law Rep. 477, 14 S. W. 685, decided under Ky. Crim. Code, § 135; State v. Barr, 61 N. J. L. 131, 32 Atl. 817, decided under Cr. Proc. Act, § 57; State v. Feazell, 132 Mo. 176, 33 S. W. 788, decided under Rev. St. 1889, § 4111.

An averment that the money is "lawful money" is held unnecessary. Rains v. State, 137 Ind. 83, 36 N. E. 532. The averment that

money embezzled was "lawful money of the United States" may be unnecessary under a statute. State v. Noland, 111 Mo. 473, 19 S. W. 715, decided under Mo. Rev. Stat. 1889, § 4111.

Sufficient averments as to money in particular cases see:

United States.—United States v. Greve, 65 Fed. 488; United States v. Bornemann, 36 Fed. 257.

**Alabama.**—Owens v. State, 104 Ala. 18, 16 So. 575; Garden v. State (Ala.), 7 So. 801.

**Florida.**—Porter v. State, 26 Fla. 56, 7 So. 145.

Indiana.—Hammond v. State, 121 Ind. 512, 23 N. E. 515.

New Mexico.—United States v. Fuller, 5 N. M. 80, 20 Pac. 175.

Texas.—Green v. State, 28 Tex. App. 493, 13 S. W. 784; Spencer v. State (Tex. Cr.), 65 S. W. 58; Kelley v. State, 34 Tex. Cr. 412, 31 S. W. 174; Lewis v. State, 28 Tex. App. 140, 12 S. W. 736.

An indictment for the embezzlement of "funds and credits" under U. S. Rev. St., § 5209, U. S. Comp. St. 1901, p. 3497, but which sets forth no particular description of either, and contains no separate statement as to the amount of the "funds" or of the "credits" which had been

## § 349 Charging the Offense—Particular Averments.

of such property the punishment is to be awarded. In some States the amendment of indictments is permitted by statute in respect to the description or ownership of property where the court is of the opinion that the variance is not material and will not prejudice the defendant in his defense. Under such a statute it has been held proper to amend an indictment for larceny by changing the description of the property from cotton "in the lint" to cotton "in the seed," and to amend an information changing the robbery of a silver watch by changing the word "silver" to "gold." 17

§ 349. Same subject — Should aver excuse for failure to give — Unknown to grand jury.—If it is not possible to give the description required of the property then the indictment should, by a proper averment, state the reason why this cannot be done. 18 Ordinarily such a failure is excused by an averment, after a general description, that a further or more particular description of the property is to the grand jurors unknown. 18 So an indictment has been held sufficient which described the property as lawful money of the United States of America of a value specified, a

embezzled or misapplied is insufficient. United States v. Smith, 152 Fed. 542.

14. Commonwealth v. Williams, 2 Cush. (Mass.) 582, 588. Per DEWEY, J.

15. State v. Jacobs, 50 La. Ann. 448, 23 So. 608, construing La. Rev. St., § 1047; State v. Perkins, 49 La. Ann. 310, 21 So. 839; People v. Price, 74 Mich. 37, 41 N. W. 853, construing How. Stat., § 9537; People v. Hagan, 14 N. Y. Supp. 233, decided under N. Y. Code Crim. Proc., § 293; Meehan v. State, 119 Wis. 621, 97 N. W. 173, construing Wis. Stats. 1898, §§ 4703, 4706.

16. State v. Jacobs, 50 La. Ann. 447, 23 So. 608.

17. Meehan v. State, 119 Wis. 621, 97 N. W. 173.

18. Burney v. State, 87 Ala. 80, 6 So. 391; State v. Dawes, 75 Me. 51; State v. Segermond, 40 Kan. 107, 19 Pac. 370; Baggett v. State, 69 Miss. 625, 13 So. 816. See Commonwealth v. Sawtelle, 11 Cush. (Mass.) 142; Commonwealth v. Strangford, 112 Mass. 289.

19. Porter v. State, 26 Fla. 56, 7 So. 145; Fleener v. State, 58 Ark. 98, 23 S. W. 1; Campbell v. State (Miss.), 17 So. 441.

In describing money a general description may be sufficient where a more particular description is so excused. Carr v. State, 104 Ala. 4, 16 So. 150.

more particular description of which was unknown, the court holding that it was not necessary to allege whether it was gold, silver or paper money of the United States, or whether it was current money.<sup>20</sup>

§ 350. Same subject — Averments as to value.—Although it is said that it is generally unsafe to omit the statement of value unless some statute clearly dispenses with it, except, perhaps, in the case of the larceny of money which is specifically described as being of some of the particular kinds of which the value is expressly prescribed by act of Congress;<sup>21</sup> yet it is a general rule that a positive averment of value is only necessary in those cases where value is an ingredient of the offense.<sup>22</sup> Thus, where by statute a distinction is made in the punishment and grade of the

20. Malcolmson v. State, 25 Tex. App. 267, 8 S. W. 468. Compare State v. Denton, 74 Md. 517, 22 Atl. 305.

**21**. Merwin v. People, 26 Mich. 298.

Judicial notice will be taken of the value of money which is alleged to be "currency of the United States of America" (Gady v. State, 83 Ala. 51, 3 So. 420. See Morris v. State [Tex. Cr.], 20 S. W. 979). So where an indictment charged the taking of "one hundred and seventy dollars in paper currency of the United States of America commonly called 'greenbacks,'" it was held sufficient, without a specific allegation of value (Turner v. State, 124 Ala. 59, 27 So. 272). And "lawful money of the United States" of a stated amount has been held sufficient (People v. Riley, 75 Cal. 98). And a description of the property as "five dollars in money" has been held sufficient (Hammond v. State, 121 Ind. 512, 23 N. E. 515, decided under Ind. Rev. St., § 1750. See State v. Brown. 113 N. C. 645, 18 S. E. 51. But see State v. Segermond, 40 Kan. 107, 19 Pac. 370).

The descriptive words in an indictment "United States paper currency money" includes treasury notes, gold and silver certificates. Rucker v. State (Tex. Cr.), 20 S. W. 65.

California.—People v. Rice,
 Cal. 220, 14 Pac. 851.

Louisiana.—State v. Hill, 46 La. Ann. 736, 15 So. 145.

Maine.—State v. Perley, 86 Me. 427, 30 Atl. 74, 41 Am. St. Rep. 564.

**Missouri.**—State v. Sharp, 106 Mo. 106, 17 S. W. 225.

Nebraska.—Wilson v. State, 43 Neb. 745, 62 N. W. 209.

New York.—People v. Jeffery, 82 Hun, 409, 31 N. Y. Supp. 267; People v. Higbie, 66 Barb. 131.

North Carolina.—State v. Brown, 113 N. C. 645, 18 S. E. 51.

Texas.—Williams v. State, 34 Tex. Cr. 523, 31 S. W. 405; Hamilton v. State (Tex. Cr.), 24 S. W. 32. crime dependent upon the value of the property, it is necessary that there should be a statement of value in the indictment, as value is of the essence of the offense.<sup>23</sup>

§ 351. Same subject — Averments as to ownership.—There are some offenses, such as larceny or embezzlement, where the criminal act is directed against the personal property of another, and in charging which, it is essential to the sufficiency of an indictment, that, in describing the property affected, there should be an averment of ownership, custody or possession.<sup>24</sup> So to constitute a good indictment for larceny the thing stolen must be charged to

23. Grant v. State, 35 Fla. 581, 17 So. 225; Merwin v. People, 26 Mich. 298.

Value of several articles stolen at one time may be stated in a lump sum. People v. Robles, 34 Cal. 591; State v. Brew, 4 Wash. 95, 29 Pac. 762.

24. United States. — United States v. Watkins, 3 Cranch C. C. 441, 458.

**Alabama.**—Bowen v. State, 106 Ala. 178, 17 So. 335.

**Ark.** 17, 22 S. W. 955; Boles v. State, 58 Ark. 35, 22 S. W. 887.

California.—People v. Hanselman, 76 Cal. 460, 18 Pac. 425; People v. Hall, 19 Cal. 425.

**Colorado.**—Miller v. People, 13 Colo. 166, 21 Pac. 1025.

**Florida.**—Grant v. State, 35 Fla. 581, 17 So. 225.

**Georgia.**—Cooper v. State, 89 Ga. 222, 15 S. E. 291.

Maryland.—State v. Blizzard, 70 Md. 385, 17 Atl. 270.

Missouri.—State v. Ellis, 119 Mo. 437, 24 S. W. 1017.

New York.—People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551; People v. Romaine, 1 Wheeler's Cr. Cas. 369; People v. Smith, 1 Park, Cr. R. 329.

North Dakota.—State v. Collins, 4 N. D. 433, 61 N. W. 467.

Oreg. 352, 24 Pac. 523.

**Pennsylvania.** — Commonwealth v. Hoggel, 7 Kulp. 10.

Texas.—Higgins v. State (Tex. App.), 19 S. W. 503; Otero v. State, 30 Tex. App. 450, 17 S. W. 1081; Mays v. State, 28 Tex. App. 484, 13 S. W. 787; Kimbrough v. State, 28 Tex. App. 367, 13 S. W. 218; Langham v. State, 26 Tex. App. 533, 10 S. W. 113; Crane v. State, 26 Tex. App. 482, 9 S. W. 773.

The usual form in stating the ownership of personal chattels is that they are "the goods and chattels of A B," or sometimes "the property of A B." Commonwealth v. Williams, 2 Cush. (Mass.) 582, 587.

An allegation by recital is sufficient. People v. Piggott, 126 Cal. 509, 59 Pac. 31.

Charging ownership in one to the grand jurors unknown may excuse failure to state owner and be sufficient, though it is not stated that the unknown person is not the acbe the property of the actual owner, or of a person having a special property as bailee, and from whose possession it was stolen.<sup>25</sup> In the application of this rule it has been held sufficient under the facts of particular cases to lay the ownership of property in the one having the lawful possession;<sup>26</sup> in a bailee;<sup>27</sup> in a conditional purchaser;<sup>28</sup> in a married woman;<sup>29</sup> husband;<sup>30</sup> purchaser in good

cused. Reed v. State, 32 Tex. Cr. 139, 22 S. W. 403.

A statement of the name is sufficient where the Christian name is not given in full, only an initial being used (State v. Sweeney, 56 Mo. App. 409). And an indictment is held sufficient where neither the Christian name or an initial is given (Farmer v. State [Tex. Cr.], 28 S. W. 197). And the surname of the owner has been held sufficiently stated where the surname of the father is alleged (Young v. State, 30 Tex. App. 308, 17 S. W. 413).

A misnomer is not material where name of owner is not necessary (United States v. Howard, 3 Sumn. 12), or where it is so provided by statute (Hennessey v. Commonwealth, 10 Ky. Law Rep. 823, 11 S. W. 13, decided under Ky. Crim. Code, § 128).

Where the owner is a corporation the indictment should allege such fact (Thurmond v. State, 30 Tex. App. 539, 17 S. W. 1096), but need not allege its capacity to own the property (Territory v. Garcia [N. M. 1904], 75 Pac. 34). It is sufficient to allege the property as that of "an incorporated company, to wit," followed by the name of the corporation (Stallings v. State, 29 Tex. App. 230, 15 S. W. 716). See, as to stating name of corporation, sections 361-363 herein.

In an indictment for break-

ing and entering a house with intent to commit larceny the name of the owner of the property which the defendant intended to steal need not be given. People v. Shaber, 32 Cal. 36.

An amendment as to the name of the owner is allowable where authorized by statute. State v. Casavant, 64 Vt. 405, 23 Atl. 636.

25. People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551. Per Fullerton, J.

Where several different articles belonging to different persons severally are together, and all of them are stolen in one act at the same time, the particular ownership of the several articles should be averred in an indictment therefor. State v. Congrove, 109 Iowa, 66, 80 N. W. 227.

26. State v. Addington, 1 Bailey (S. C.), 310. See State v. Bishop, 98 N. C. 773, 4 S. E. 357.

27. Alabama.—Fowler v. State, 100 Ala. 96, 14 So. 860.

Florida.—Kennedy v. State, 31 Fla. 428, 12 So. 858.

Georgia.—Wimbish v. State, 89 Ga. 294, 15 S. E. 325.

New York.—People v. Smith, 1 Park. Cr. R. 329.

North Carolina.—State v. Powell, 103 N. C. 424, 9 S. E. 627, 4 L. R. A. 291.

28. Fowler v. State, 100 Ala. 96, 14 So. 860.

29. Johnson v. State, 100 Ala. 55,

faith and for value, though the party from whom the purchase was made had no title;<sup>31</sup> in the estate of one and partners;<sup>32</sup> in a person named, though property owned by him and others jointly;<sup>33</sup> in a sheriff in possession under attachment proceedings;<sup>34</sup> in one in the actual care, control and management;<sup>35</sup> in a minor;<sup>36</sup> and, where the property was whiskey stored in a government warehouse, in one who had the right to take it away upon payment of the tax.<sup>37</sup>

§ 352. Averments describing real property.—Whenever in charging an offense, it is necessary to describe a house or land, the premises must be set out in terms sufficiently certain to identify them.<sup>38</sup> So it is said that "in an indictment for forcible entry and detainer, to allege that the defendant entered two closes of meadow or pasture, a house, a rood of land, or certain lands belonging to a house is bad; for the same certainty is required as in a declaration in ejectment.<sup>39</sup> So it is decided that the offense of

14 So. 627; La Pointe v. UnitedStates, 23 Wash. L. Rep. 482; Kennedy v. State, 31 Fla. 428, 12 So. 858.

**30.** Kennedy v. State, 31 Fla. 428, 12 So. 858; People v. McCarty, 5 Utah, 280, 17 Pac. 734.

31. Gooch v. State, 60 Ark. 5, 28 S. W. 510.

**32**. People v. Ribolski, 89 Cal. 492, 26 Pac. 1082.

33. Mullins v. Commonwealth, 11 Ky. Law Rep. 345, 12 S. W. 137.

34. Lenhart v. State, 33 Tex. Cr. 504, 27 S. W. 260.

**35.** Alford v. State, 31 Tex. Cr. 299, 20 S. W. 553; Arcia v. State, 28 Tex. App. 198, 12 S. W. 599.

36. Phillips v. State, 85 Tenn. 551, 3 S. W. 434, so holding where the property was clothing owned and worn by her.

37. State v. Harmon, 104 N. C. 792, 10 S. E. 474.

38. Commonwealth v. Brown, 15 Gray (Mass.), 189; State v. Mallory, 34 N. J. L. 410.

Where a house is indicted it should be so described as to leave no reasonable doubt of its locality, Norris' House v. State, 3 G. Greene (Iowa), 513.

An amendment of the description of premises may be allowed by statute. State v. Satterwhite, 52 La. Ann. 499, 26 So. 1006.

A vault for the interment of the dead is not a building within the provisions of the New York Penal Code, §§ 498, 504, defining the crime of burglary in the third degree, nor is it an "erection or enclosure" within § 504, specifying what the term "building" as used in the chapter in relation to burglary includes, and an indictment for that offense is not sustained by proof of the breaking and entering such a structure. People v. Richards, 108 N. Y. 137, rev'g 44 Hun, 278.

39. Commonwealth v. Brown, 15 Gray (Mass.), 189, 191. Per BIGE-

arson is local in its nature and requires a local description of the building the subject of arson and that the words "there situate" are material.40 And an indictment under a statute for fraudulently conveying real estate without giving notice of an incumbrance which does not describe with sufficient certainty the real estate conveyed, is bad.41 Again in an indictment for maintaining and keeping a common nuisance there is said to be no doubt that the place in which the nuisance is kept and maintained must be alleged to be in a particular town, though the place in the town in which it is kept need not be specifically described.42 So an indictment for an attempt to destroy a dam has been held sufficient in this respect where it contained an allegation that the dam was situated in a certain named town, the court declaring that it has often been held that in indictments for keeping and maintaining as a nuisance a particular building, its location need not be specifically described, it being sufficient if it is alleged to be in a certain town named.43 And in an indictment for a nuisance affecting the highway it is not necessary to set out the termini of the highway, it being sufficient to state the town and county in which the nuisance was committed, coupled with an averment that the highway is located there.44

Low, J., citing 1 Hawk, chap. 64, § 37; 3 Chit. Crim. Law, 1122.

**40**. State v. Gaffrey, 3 Pinn. (Wis.) 369.

41. Commonwealth v. Brown, 15 Gray (Mass.), 189. The court said: "The defendant may have owned other parcels of land in the city of Salem, which he conveyed to the prosecutor on the day alleged. From the indictment alone therefore it is impossible to say with certainty to what parcel of land the charge relates, or to know that the conveyance proved at the trial was of the same parcel as that on which the indictment was founded." Per BIGELOW, J.

42. Commonwealth v. Logan, 12 Gray (Mass.), 136. See Commonwealth v. Gallagher, 1 Allen (Mass.), 592, wherein it is said: "It is never necessary to set out the precise locality where the offense was committed. If the city or town where the building or tenement is situated is distinctly set out, no further averment of place is necessary." Per Bigglow, J., citing Commonwealth v. Welsh, 1 Allen (Mass.), 1.

**43**. Commonwealth v. Tolman, 149 Mass. 229, 21 N. E. 377, 14 Am. St. Rep. 414, 3 L. R. A. 747.

44. Commonwealth v. Hall, 15 Mass. 240.

See also as to description of streets

§ 353. Same subject — Averments as to ownership.—In describing real property in an indictment it may be necessary that there should be an averment as to ownership or occupation of such property, an averment of this character being in many cases essential to a proper charging of the offense as identifying the property referred to, in order to inform the accused of the precise offense of which he is charged.<sup>45</sup> In this connection it has been decided that there is a sufficient averment where the name of the occupant or tenant of the house or building is given;<sup>46</sup> or of the husband, though the legal title is in the wife, where both occupy it as their home.<sup>47</sup> And in the case of land it may be described

or highways, State v. Mathis, 21 Ind. 277; State v. Newfane, 12 Vt. 422; Parkinson v. State, 2 W. Va. 589.

See Commonwealth v. Newbury, 2 Pick. (Mass.) 51, wherein it is declared that "It seems not to be necessary in an indictment for not repairing a highway, to set out the terminia quo and ad quem of the way, though it is certainly better to be thus particular, and is more consistent with the course of criminal proceedings, which require certainty whenever it is attainable." Per Parker, J.

45. **Kentucky.**—Gregory v. Commonwealth, 2 Dana, 417.

Nebraska.—Winslow v. State, 26 Neb. 308, 41 N. W. 1116.

North Carolina.—State v. Morgan, 1 Wins. No. 1246.

**Texas.**—Woodward v. State, 33 Tex. Cr. 554, 28 S. W. 204; Mulligan v. State, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 664.

West Virginia.—State v. Hupp, 31 W. Va. 355, 6 S. E. 919.

A variance between the allegation of ownership and the proof is fatal. Morris v. State (Miss.), 8 So. 295, so holding in case of a conviction of arson: Williams v. State (Tex. Cr. 1906), 90 S. W. 876, so holding in case of an indictment for burglary.

In stating the ownership of real property a very general mode in an indictment for burglary is similar to the following, that is, that the defendant broke and entered "the city hall of the city of Charleston." Commonwealth v. Williams, 2 Cush. (Mass.) 582, 587.

In an indictment for burglary in breaking and entering a rail-road car under the Alabama Code (Ala. Code, § 4344), the ownership of the car broken into and entered is an indispensable averment. Graves v. State, 63 Ala. 134.

46. Kentucky.—Commonwealth v. Elliston, 14 Ky. Law Rep. 216, 20 S. W. 214.

Maine.—State v. Whittier, 21 Me. 341.

Missouri.—State v. Tyrrell, 98 Mo. 354, 11 S. W. 734.

**Texas.**—Reed v. State, 34 Tex. Cr. 597, 31 S. W. 404.

Washington.—State v. Johnson, 4 Wash. 593, 30 Pac. 672.

**47**. Young v. State, 100 Ala. 126, 14 So. 872.

as belonging to the estate and heirs of a person deceased, his name being given. 48 If land is worked by one on shares, ownership may be laid in the actual owner, though the former is in possession of some buildings, his possession being limited to the depositing of crops therein.49 Ownership may also be laid in one or more of several partners under a statute so providing.50 And where two corporations had the exclusive possession and control of a railroad depot owned by a third corporation, it was held sufficient in an indictment for breaking and entering the depot, to describe it as the railroad depot of such two corporations.<sup>51</sup> Again an indictment for breaking and entering the storehouse of a certain named company with intent to steal the goods and chattels of that company, has been held to sufficiently aver ownership of the premises and of the goods by stating them to be of the company designated, stating its name.<sup>52</sup> It is also said in this connection that the rule that where there are several occupants of a house, it must be described, in an indictment for burglary, as the house of the general owner, would seem to be limited to cases where the owner dwells in part of the house. His mere occupancy of a part for another purpose than a dwelling house will not prevent another part, exclusively occupied by a tenant, from being described in an indictment for burglary as the dwelling house of the tenant.<sup>53</sup>

§ 354. Names of third persons — Necessity of stating.—It is a general rule that the name of the one injured, either in his person or property, by the act of the accused, or of one whose identity is

holding that where burglary of a room in a hotel or boarding house is alleged, ownership may be laid in one who occupies it under a contract of rental.

That an indictment for breaking into an office charged it to have been in an individual's passession, when the proof showed that it was in the possession of such person as the president of a corporation, is immaterial. State v. Porter, 97 Iowa, 450, 66 N. W. 745.

**<sup>48</sup>**. State v. Paul, 81 Iowa, 596, 47 N. W. 773.

**<sup>49</sup>**. People v. Smith, 3 How. Pr. (N. Y.) 226.

<sup>50.</sup> Van Horn v. State, 5 Wyo. 501, 40 Pac. 964, decided under Wyo. Sess. Laws 1888, chap. 40, § 10.

**<sup>51</sup>**. State v. Scripture, **42** N. H. 485.

<sup>52.</sup> Fisher v. State, 40 N. J. L. 169.

State v. Rand, 33 N. H. 216,
 Per Perley, J. See State v. Johnson, 4 Wash. 593, 30 Pac. 672,

essential to a proper description of the offense, should be stated in an indictment if it is known, or if not known a failure to state it should be excused by an averment that it is not known.<sup>54</sup> S<sub>0</sub>

54. United States. — United States v. Wallace, 40 Fed. 144.

Alabama.—Cheek v. State, 38 Ala. 227.

Colorado. — Sault v. People, 3 Colo. App. 502, 34 Pac. 263.

Connecticut.—State v. Wilson, 30 Conn. 500.

**Florida.**—Goodson v. State, 29 Fla. 511, 10 So. 738.

Illinois.—Willis v. People, 2 Ill. 399.

Indiana.—State v. Irvin, 5 Blackf. 343.

Iowa.—State v. McConkey, 20 Iowa, 574.

Massachusetts.—Commonwealth v. Sheedy, 159 Mass. 55, 34 N. E. 84; Commonwealth v. Sherman, 13 Allen, 248; Commonwealth v. Stoddard, 9 Allen, 280.

Missouri.—State v. Martin, 108 Mo. 117, 18 S. W. 1005, aff'g 44 Mo. App. 45.

**Nebraska.**—State v. Hughes, 38 Neb. 366, 56 N. W. 982.

New Mexico.—United States v. Hall, 5 N. M. 178, 21 Pac. 85.

New York.—People v. Burns, 53 Hun, 274, 6 N. Y. Supp. 611; People v. Fish, Sheld. 537.

North Carolina.—State v. Engel, 7 Ired. L. 27.

**Ohio.**—State v. Trisler, 49 Ohio St. 583, 31 N. E. 881; Block v. State, 1 Ohio St. 61.

**Pennsylvania.** — Commonwealth v. Johnson, 3 Pa. Dist. R. 222, 13 Pa. Co. Ct. 543.

Texas.—Armstrong v. State, 27

Tex. App. 462, 11 S. W. 462; Alexander v. State, 27 Tex. App. 94, 10 S. W. 764; Smith v. State, 26 Tex. App. 577, 10 S. W. 218; Rutherford v. State, 13 Tex. App. 92.

**England.**—Reg. v. Sowerby, (1894), 2 Q. B. 173.

An averment that the name is not known is sufficient.—

**Florida.**—Thomas v. State (Fla. 1905), 38 So. 516.

**Georgia.**—Nelms v. State, 84 Ga. 466, 10 S. E. 1087.

**Iowa.**—State v. Ean, 90 Iowa, 534, 58 N. W. 898.

Oklahoma.—Morgan v. Territory, 16 Okla. 530, 85 Pac. 718.

**Pennsylvania.** — Commonwealth v. Edwards, 135 Pa. St. 474, 19 Atl. 1064, 26 W. N. C. 242.

Washington.—State v. Bodeckar, 11 Wash. 417, 39 Pac. 645.

But see Hill v. State, 78 Ala. 1, holding that an indictment for the sale or removal of property on which a lien created by law exists should state the name of the person holding the lien, and that an averment that his name is to the grand jury unknown is not sufficient.

Charging as unknown when known.—An indictment charging the defendant with conspiracy with others unknown has been held sufficient, though the others were in fact known to the grand jury. People v. Mather, 4 Wend. (N. Y.) 229.

The name of the deceased in an indictment for murder was held to be sufficiently stated where the name

the rule is said to be well settled that in indictments for offenses against the person or property of individuals the christian and surnames of the parties injured must be stated if the injured party be known and that in those cases where the names are not known it must be so stated.<sup>55</sup> And in an indictment for attempting to obtain money by false pretenses, it is held essential that the name of the person to whom the false pretenses were made and that of the one from whom it was attempted to obtain the money should be stated. 56 And an indictment charging an intent to deceive and defraud "divers citizens of the State" has been held bad where it omitted to name such citizens or to aver that they were to the grand jurors unknown.<sup>57</sup> So it has been held essential that, in an indictment for the fraudulent sale of mortgaged property, there should be an averment either of the name of the person to whom it was sold, or that his name was unknown.<sup>58</sup> And likewise it was held in New York that an indictment under the laws of that State in respect to the sale or exposure for sale of impure milk,59 was fatally defective which did not either state the name of the purchaser or that his name was unknown.60

was given as "Chino," whose other name was to the grand jurors unknown. De Olles v. State, 20 Tex. App. 145.

An indictment charging the accused with conspiracy with others unknown is sufficient (Commonwealth v. Edwards, 135 Pa. St. 474, 19 Atl. 1064, 26 W. N. C. 242), and this is held to be true though such persons were known to the grand jury (People v. Mather, 4 Wend. [N. Y.] 229).

55. Willis v. People, 2 Ill. 399. Per Smith, J. See also State v. Wilson, 30 Conn. 500; State v. McConkey, 20 Iowa, 574; Commonwealth v. Stoddard, 9 Allen (Mass.), 280; State v. Angel, 7 Ired. L. (N. C.) 27.

**56**. Reg. v. Sowerby (1894), 2 Q. B. 173.

57. People v. Fish, Sheld. (N. Y.)

537. The court said: "An indictment must, as an almost universal rule, give the accused notice of all the particulars of the crime charged, which may aid him in preparing for his defense, or show a valid excuse. Hence, when a fraud is charged, the person defrauded must be named, or, in excuse, the grand jury must aver that he is to them unknown." Per CLINTON, J.

Person against whom a fraud was perpetrated must be averred in an indictment. State v. Blakely, 83 Minn. 432, 86 N. W. 419.

Alexander v. State, 27 Tex.
 App. 94, 10 S. W. 764; Smith v. State,
 Tex. App. 577, 10 S. W. 218.

**59**. New York Laws 1885, chap. 183.

**60**. People v. Burns, **53** Hun (N. Y.), 274, 6 N. Y. Supp. **611**.

§ 355. Names of third persons — Sufficiency in stating.—In the description of such persons certainty to a common intent is all that is required. And an indictment is held sufficient where the christian name is omitted, 2 or where initials are used. So it has been declared that where individuals are only collaterally concerned in the acts charged in the indictment as those whose rights, or persons, or property are affected by the acts constituting the offense, their names are sufficiently indicated by the initials of their christian name. And where an information for assault alleges that the assault was committed upon the informant, it is not vitiated by the fact that the name of the person assaulted is not stated in the charging part, where the informant has signed and verified the information.

§ 356. Names of third persons — Names commonly known by.—In stating in an indictment, the name of the person injured, it is ordinarily sufficient to designate such person by a name by which he is commonly known, and where this is done, the fact that it appears from the evidence that the name stated is not his right name does not constitute a variance which is fatal. 66 So it is said in a recent case in Alabama that it is undoubtedly true that the

61. Durham v. People, 5 Ill. 172; State v. Crank, 2 Bailey L. (S. C.) 66, 23 Am. Dec. 117; Cotton v. State, 4 Tex. 260.

62. Commonwealth v. Lampton, 4 Bibb. (Ky.) 261.

**63. Kansas.**—State v. Flack, 48 Kan. 146, 29 Pac. 571; State v. Rook, 42 Kan. 419, 22 Pac. 626.

Louisiana.—State v. Prince, 42 La. Ann. 817, 8 So. 591.

**Maine.**—State v. Cameron, 86 Me. 196, 29 Atl. 984.

South Carolina.—State v. Anderson, 3 Rich. L. 172.

Virginia. — Brown v. Commonwealth, 86 Va. 466, 10 S. E. 745.

64. Garrish v. State, 53 Ala. 476.

65. State v. McKinley, 82 Iowa, 445, 48 N. W. 804.

**66**. **Alabama.**—Ford v. State 129 Ala. 16, 30 So. 27.

**Georgia.**—Whittington v. State, 121 Ga. 193, 48 S. E. 948.

Illinois.—Willis v. People, 2 Ill. 379.

Iowa.—State v. Bartlett, 128 Iowa, 518, 105 N. W. 59.

New York.—Cawley v. People, 21 Hun, 415; O'Brien v. People, 48 Barb. 274.

South Carolina.—State v. Crank, 2 Bailey's L. 66, 23 Am. Dec. 117.

Texas.—Davis v. State (Tex.), 11 S. W. 647.

prosecution may show that the deceased was as well known by the name alleged in the indictment as by his true name, if the one alleged is not his true name, for the purpose of identification.67 And in an early case in Illinois it is said that in stating the name of a person upon whom an offense has been committed, certainty to a common intent only is necessary. The name by which he is usually known and distinguished is sufficient, without stating his residence or addition.68 So in an indictment for assaulting a person with intent to kill it is held in a recent case in New York that it is sufficient to show that such person was known by the name given in the indictment. 69 And in this connection it is decided in another case in New York that in an indictment for murder, where the true name of the deceased is charged in the indictment and proved on the trial, there is no variance, though it also appears that the deceased went by another name, and that where the name charged in the indictment is not the true name, yet if it is proved that the deceased was called by that name it is sufficient and there is no variance.70

§ 357. Names of third persons — Error in stating variance — Idem sonans.—The fact that there is a slight error in spelling the name of a third person will not vitiate an indictment where the name as stated and the correct name are *idem sonans*.<sup>71</sup> And an indictment will not be rendered defective by the fact that there is

67. Stallworth v. State (Ala. 1906), 41 So. 184.

68. Durham v. People, 5 Ill. 172.

69. People v. Way (N. Y. App. Div. 1907), 104 N. Y. Supp. 277. Judge Loughlin said: "It was clearly established that the man at whom defendant shot died as the result of a bullet wound inflicted at or about that time. It was only incumbent on the people to show that the defendant assaulted the individual named in the indictment. It was not essential for the people to show by the best evidence that they designated the person assaulted by his right

name. It is sufficient to show that he was known by that name."

70. Walters v. People, 6 Park. Cr. Rep. (N. Y.) 15.

71. Alabama.—Point v. State, 37 Ala. 148.

**Georgia.**—Herron v. State, 93 Ga. 554, 19 S. E. 243; Chapman v. State, 18 Ga. 736.

Illinois.—Barnes v. People, 18 Ill. 52.

Massachusetts.—Commonwealth v. Woods, 10 Gray, 477.

Minnesota.—State v. Timmens, 4 Minn. 325. a slight error in spelling the christian name of such a person.72 or by the fact that there is an error stating an initial,73 or by the omission of an initial.<sup>74</sup> In this connection it has been decided where, in an indictment for bigamy, the name of the defendant's first wife was spelled "Celeste" and she testified that her first name was spelled "Celestia" and she pronounced it in two syllables with the accent on the last, and no other evidence as to the sound or pronunciation of "Celeste" was given, that the question of misnomer was rightly submitted to the jury in the application of the rule that where the two names do not necessarily sound alike, the question of whether they are idem sonans is one for the jury. 75 Again where the name of the person injured is correctly stated in an indictment where it occurs the first time, subsequent statements of it in which there is an apparent variation may be rejected as surplusage. 76 An error in stating the name may also by statute be cured by amendment.<sup>77</sup>

§ 358. Names of third persons — Statutes as to error in stating.—In many States statutes have been passed which provide in substance that if the offense is described with sufficient certainty in an indictment it will not be vitiated by an error in stating the name of the person injured.<sup>78</sup> So where it is provided by statute

North Carolina.—State v. Patterson, 2 Ired. L. 346.

South Carolina.—State v. Farr, 12 Rich. L. 24.

Compare Haworth v. State, Peck (Tenn.), 89.

72. Hall v. State, 32 Tex. Cr. 594, 25 S. W. 292. See State v. Dickerson, 24 Mo. 365.

There is no variance between the indictment and the proof from the fact that the person murdered is described in the indictment as "John Young, Jr.," while most of the witnesses refer to him as "Johnnie Young," where it is not shown that there is any other person in the locality known as "John Young, Jr." Colombo v. People, 182 Ill. 411, 55 N. E. 519.

73. Bernhard v. State, 76 Ga. 613.

74. People v. Ferris, 56 Cal. 442.

75. Commonwealth v. Warren, 143 Mass. 568, 10 N. E. 178.

**76.** Cotton v. State, 4 Tex. 260. See Langdon v. People, 133 Ill. 382, 24 N. E. 874.

77. State v. Tulla, 72 N. J. L. 575, 62 Atl. 675, holding that where the person killed was described as "John Santa," and it appeared that his name was "Joseph Santa," the court could direct an amendment of the indictment under Crim. Proc. Act, § 34; N. J. Rev. Laws, 1898, p. 878.

78. People v. Anderson, 80 Cal.

that where an offense involving the commission of, or an attempt to commit, a private injury, is described with sufficient certainty in other respects to identify the act, an erroneous allegation of the person injured is immaterial, an indictment for larceny is held not insufficient, in failing to properly state the owner of the stolen property, if it is sufficient to apprise defendant of the offense of which he is charged.<sup>79</sup>

§ 359. Names of third persons — When not necessary to state.—The names of third persons who are collaterally connected with the offense, and whose identity is not essential to such a description thereof as is necessary to properly inform the accused of the nature and cause of the accusation against him, need not be stated. So it has been decided that in an indictment for altering and defacing ballots the names of electors whose ballots are claimed to have been altered need not be stated; that in an indictment for betting at a game of cards the names of others than the accused, who were betting, need not be given; that in an indictment for

205, 22 Pac. 139; Cal. Pen. Code, § 956; State v. Congrove, 109 Iowa, 66, 80 N. W. 227; Iowa Code, § 5286; McClain's Ann. Code, 1888, § 5687; Commonwealth v. Stone, 152 Mass. 498, 25 N. E. 967; Mass. Pub. Stat., chap. 213, § 16; State v. Riley, 100 Mo. 493, 13 S. W. 1063; Mo. Rev. Stat., §§ 1812, 1820.

79. State v. Vincent, 16 S. D. 62, 91 N. W. 347. But see State v. Blakely, 83 Minn. 432, 86 N. W. 419.

80. Illinois.—Binger v. People, 21 Ill. App. 367.

Indiana.—State v. Hopper, 133 Ind. 460, 32 N. E. 878; State v. Mc-Cormack, 2 Ind. 305.

Iowa.—State v. Garrett, 80 Iowa, 589, 46 N. W. 748.

Mich. 644, 54 N. W. 487; People v. Van Alstine, 57 Mich. 69, 23 N. W. 594.

Mississippi.—Campbell v. State (Miss.), 17 So. 441.

Missouri.—State v. Warren, 109 Mo. 430, 19 S. W. 191.

North Carolina.—State v. Foy, 98 N. C. 744, 3 S. E. 524.

**Oregon.**—State v. Light, 17 Oreg. 358, 21 Pac. 132.

Pennsylvania.—Gorman v. Commonwealth, 124 Pa. St. 536, 17 Atl. 26.

Texas.—Franklin v. State, 34 Tex. Cr. 203, 29 S. W. 1088.

Washington.—State v. Wilson, 9 Wash. 16, 36 Pac. 967; Foster v. State, 1 Wash. 411, 25 Pac. 459.

West Virginia.—State v. Tingler, 32 W. Va. 546, 9 S. E. 935.

81. Binger v. People, 21 Ill. App. 367.

82. State v. Light, 17 Oreg. 358, 21 Pac. 132. See State v. Wilson, 9

resisting an officer while taking a prisoner to jail it is not necessary to give the name of the prisoner;83 that in an indictment against a justice for failure to make out and file a list of the fines assessed by him, the names of those against whom the fines had been assessed need not be stated;84 that it is not necessary to allege, in an information for receiving stolen goods, the name of the one by whom the goods were stolen;85 that in an indictment for forgery with intent to defraud it is not necessary to state the name of the one intended to be defrauded;86 that in an indictment for sale of intoxicating liquors in violation of law the names of parties to whom a sale was made need not be stated,87 and that the name of a person upon whom the defendant practiced need not be alleged in an indictment for practicing medicine without a license.88 it is held that in an indictment for bigamy it is not necessary to state the name of the person by whom the first marriage was solemnized, or the maiden name of the first wife;89 or in an indictment for adultery to state the name of the defendant's wife;90 or in an indictment for attempt to commit rape, which charges that the prosecutrix was a married woman, to state the name of her husband;91 or in an indictment for keeping a disorderly house, to allege the names of any persons who frequented it.92

Wash. 16, 36 Pac. 967; Foster v. State, 1 Wash. 411, 25 Pac. 459.

83. State v. Garrett, 80 Iowa, 589, 46 N. W. 748.

84. State v. McCormack, 2 Ind. 305. See State v. Foy, 98 N. C. 744, 3 S. E. 524.

85. People v. Smith, 94 Mich. 644, 54 N. W. 487.

86. United States v. Jolly, 37 Fed. 10; People v. Van Alstine, 57 Mich. 69, 23 N. W. 594; State v. Warren, 109 Mo. 430, 19 S. W. 191; State v. Tingler, 32 W. Va. 546, 9 S. E. 935.

87. Florida.—Dansey v. State, 23 Fla. 316, 2 So. 692.

Kansas.—State v. Moseli, 49 Kan. 142, 30 Pac. 189; Junction City v. Webb, 44 Kan. 71, 23 Pac. 1073.

Louisiana.—State v. Brown, 41 La. Ann. 771, 6 So. 638.

Missouri.—State v. Wingfield, 115 Mo. 428, 22 S. W. 363; State v. Ford, 47 Mo. App. 601; State v. Houts, 36 Mo. App. 265.

North Dakota.—State v. Dellaire, 4 N. D. 312, 60 N. W. 988.

88. State v. Van Doran, 109 N. C. 864, 14 S. E. 32.

89. Hutchins v. State, 28 Ind. 34. Compare State v. La Bore, 26 Vt. 765.

90. Gorman v. Commonwealth, 124 Pa. St. 536, 17 Atl. 26.

91. Franklin v. State, 34 Tex. Cr. 203, 29 S. W. 1088.

**92.** State v. Patterson, 7 Ired. L. (N. C.) 70.

§ 360. Names of third persons - Infants. - An indictment for the murder of an infant child, which alleges that the child had no name,93 or that its name is to the grand jurors unknown is sufficient.94 And in a case in England, where an indictment for the murder of a bastard child, described the prisoner as a single woman, stated, that she, being big with a male child, did bring forth the said child alive and that she "afterwards, to wit, on the day and year aforesaid, with force and arms . . . in and upon the said male child, feloniously did make an assault," etc., it was held that the child was sufficiently described, although the indictment neither stated the name of the child, nor that its name was to the jurors unknown, nor that it had no name.95 In an earlier English case, however, it was held that an indictment for the murder of an illegitimate child could not be sustained which alleged that the child was "a female of tender age, whose name is to the jurors aforesaid unknown," in the absence of evidence showing that the name of the child could not reasonably have been supposed to be known by the grand jury.96

§ 361. Names of third persons — In case of corporations.— Where the party against whom an offense has been committed is a corporation an indictment therefor should, as a general rule, state the corporate name and that it is a corporation. <sup>97</sup> So it has been decided in New York that it is necessary to allege in the indict-

93. Triggs v. State (Tex. Cr. 1899), 53 S. W. 104, holding also that it was not necessary to allege the age or sex of the deceased. See also Puryear v. State, 28 Tex. App. 73, 11 S. W. 929.

**94**. State v. Richmond, 42 La. Ann. 299, 7 So. 459.

95. Regina v. Willis, 1 Car. & K. 722. Judge Coleride said in this case: "I think the objection ought not to prevail. The objection is founded in this: that it must be presumed that the child had a name; but this child could only acquire a name by reputation, because it was an ille-

gitimate child, and had no name when it came into the world. To state that its name was to the jurors unknown assumes that something had been done by which the child had acquired a name; but as there is nothing here to show that the child had acquired any name that allegation is unnecessary."

96. Regina v. Stroud, 1 Car. & K. 187, so holding where it clearly appeared that the child had a christian name.

97. Alabama.—Emmonds v. State, 87 Ala. 12, 6 So. 54.

ment and also to prove at the trial, that the corporation alleged to have been injured by the offense of the defendant was an existing corporation.98 And in this connection it is said that "the indictment should aver facts which show that the company is a corporation. The use of a name which may import a corporation, or which, on the other hand, may be that of a voluntary association or a simple partnership, will not suffice. It is enough in civil causes, depending on corporate character, at least on appeal, to allege a name appropriate to a corporation; but the rule which requires indictments to aver every fact necessary to an affirmation of guilt, is not satisfied, as long as any one of these facts is left to implication or inference."99 And it has been decided that the expression "railroad company" does not necessarily import a corporation and that the court will not take judicial notice that the company is a corporation unless it is so alleged. But it is said in a case in Indiana: "We think it fairly deducible from the authorities, that, when an ideality is referred to in a pleading by a name such as is usual in creating corporations, and which discloses no individuals, a corporate existence is implied without being specially averred." And it has been decided that a statement of the name of the corporation as owner of the property in an indictment for larceny is sufficient without averring that it is a corporation.3 So in a case in New York it was decided that "The

**Arkansas.**—See Gage v. State, 67 Ark. 308, 55 S. W. 165.

California.—People v. Bogart, 36 Cal. 245.

Texas.—Thurmond v. State, 30 Tex. App. 539, 17 S. W. 1098; Brown v. State, 26 Tex. App. 540, 10 S. W. 112.

Vermont.—State v. Mead, 27 Vt. 722.

It is ordinarily sufficient in an indictment for an offense committed against a corporation to give the corporate name and to state that the company named is a corporation doing business in the State. Duncan v. State, 29 Fla. 439, 10 So. 815.

98. Cohen v. People, 5 Park. Cr. Rep. (N. Y.) 330.

99. Emmonds v. State, 87 Ala. 12, 6 So. 54. Per McClellan, J.

1. State v. Mead, 27 Vt. 722. The court said: "The expression 'railroad company' does not ex vi termini import that of necessity they must be a corporation under the laws of this State or any other State; and we cannot, unless it is so alleged, take judicial notice that such is the fact." Per Bennett, J.

2. Johnson v. State, 65 Ind. 204. Per Niblack, J.

3. State v. Rollo, 3 Penn. (Del.) 421, 54 Atl. 683.

Meriden Cutlery Company" was a sufficient designation of the body, partnership or persons intended to be defrauded, it being declared that it appearing on the trial that a company did business under that name, and was defrauded, it was immaterial whether it was or was not incorporated, or what was its constitution, it being enough to show an existing body of persons, capable of being defrauded.4 And in this connection it is held that it is not necessary to the sufficiency of an indictment for burglary and larceny that it should allege that the owner of the property was a corporation, or that as such it was capable of owning property.<sup>5</sup> And in a case in Tennessee, where one had been indicted for the fraudulent possession or concealment of a counterfeit bank note, purporting to have been issued by a public banking corporation of that State, it was complained of as error that the court refused to instruct the jury that it was necessary to aver and prove that the bank was a chartered institution, and it was held that such refusal was correct, it being declared that "the courts well judicially know that fact, as to the banks within the State, and what is judicially known need not be averred and proved." It was, however, further declared that it was otherwise as to extra-territorial banks, and that their existence when material must be averred and proved by the production of their charters of incorporation.<sup>6</sup> Again, an averment in an information for the malicious destruction of property, that it belonged to a specified church "society" has been held not to render the information bad where it is provided by statute that no information shall be held insufficient because any person mentioned therein is designated by a descriptive appellation instead of his proper name and that, in the construction of statutes, the

See People v. Henry, 77 Cal. 445, 19 Pac. 830.

People v. Jackson, 8 Barb. (N. Y.) 637, wherein it is said, upon the question of judicial notice: "Bank charters are generally private statutes, and there are many banks in this State organized under the general banking law, carried on by associations and individual bankers. In all such cases the court can not take judicial notice of them, any more than

<sup>4.</sup> Noakes v. People, 25 N. Y. 380.

State v. Shields, 89 Mo. 259, 1
 W. 336; Fisher v. State, 40 N. J.
 L. 169; State v. Grant, 104 N. C. 908,
 S. E. 554, 27 Am. & Eng. Corp. Cas. 490.

<sup>6.</sup> Owen v. State, 5 Sneed. (Tenn.), 493. Per Caruthers, J. Compare

## § 362 CHARGING THE OFFENSE—PARTICULAR AVERMENTS.

word person may extend to and be applied to corporations.<sup>7</sup> And where by statute certain acts against a railroad corporation are made criminal offenses, it is essential in an indictment thereunder that persons against whom such an offense is alleged to have been committed should be stated as within the class specified by the statute.<sup>8</sup>

§ 362. Same subject continued — Organization of corporation.—Although there should generally be an averment of the name of the corporation and the fact that it is a corporation, yet it is decided that where an offense is committed against the property of another it is generally sufficient to describe the owner, if a corporation, by its corporate name, stating in substance that it is a corporation, without averring that it "was incorporated" or "was duly incorporated."9 So in an indictment for wilfully and maliciously burning a bridge owned by a corporation it has been decided that it is sufficient to describe the owner by its corporate name and state in substance that the company is a corporation doing business in the State, it not being necessary to allege that it was "duly organized or incorporated under the laws of any State or territory." And in an early case in New York it was held that an indictment for grand larceny of bank notes was sufficient which alleged that the defendant stole, took and carried away certain promissory notes, issued by certain named banks, it being declared that it was of no consequence whether the banks were organized within the bounds and under the laws of that State or were banks of other States or countries, so far as the allegations in the indictment were concerned, the names of the banks being merely mentioned by way of description of the property stolen.<sup>11</sup> And where it is averred in an indictment that the company injured

it could of an ordinary partnership between two or more individuals." Per Wells, J.

<sup>7.</sup> People v. Ferguson, 119 Mich. 373, 78 N. W. 334, decided under 2 How. Stat., § 9534, and 1 How. Stat., § 2, subd. 12.

<sup>8.</sup> State v. Mead, 27 Vt. 722.

<sup>9.</sup> Duncan v. State, 29 Fla. 439, 10 So. 815; Owen v. State, 5 Sneed. (Tenn.), 493. See Gates v. State, 71 Miss. 874, 16 So. 342.

Duncan v. State, 29 Fla. 439,
 So. 815.

People v. Jackson, 8 Barb. (N. Y.) 637.

is a corporation, proof of the existence of the corporation de facto is held to support the averment.<sup>12</sup>

- § 363. Same subject Unnecessary averments.—Whether a corporation is a domestic or foreign corporation need not be averred.<sup>13</sup> And in an indictment for larceny from a corporation it is not necessary to state the law under which it is incorporated.<sup>14</sup> And where the ownership of stolen property is laid in a corporation it is not necessary to state the names of the shareholders.<sup>15</sup>
- § 364. Names of third persons Partners or joint owners.— Where an offense has been committed against a partnership an indictment therefor should allege that fact and state the names of the individual partners. And at common law if stolen goods are the property of partners, or joint owners, the names of all the partners, or joint owners, must be stated. To in an early case in California it was decided that an indictment for burning a building insured against fire, with intent to defraud an insurance company, should aver that the company was a corporation, if such were the fact, or that it was a partnership composed of certain individuals, naming them, if such were the fact, and that the act was done with intent to injure and defraud them in their associate capacity. And where the charge is the intent to injure a body
- 12. People v. Schwartz, 32 Cal. 160; Duncan v. State, 29 Fla. 439, 10 So. 815, wherein the court said: "It is sufficient if the indictment states simply that it is a corporation; and the proof of this allegation in such cases, we think, is sufficient, if it shows that the company named was de facto in existence, and, de facto, exercising corporate functions and franchises." Per Taylor, J.
- 13. Johnson v. State, 65 Ind. 204. See State v. Fitzpatrick, 9 Houst. (Del.) 385.
- 14. McCarney v. People, 83 N. Y. 408. See also Smith v. State, 34 Tex. Cr. 265, 30 S. W. 236.

- 15. Emmonds v. State, 87 Ala. 12, 6 So. 54.
- Emmonds v. State, 87 Ala. 12,
   So. 54; People v. Bogart, 36 Cal.
   245.
- 17. People v. Bogart, 36 Cal. 245. Per Sanderson, J., citing Common-wealth v. Trimmer, 1 Mass. 476; Hogg v. State, 3 Blackf. (Ind.) 326; State v. Owens, 10 Rich. L. (S. C.) 169.

Compare People v. Curling, 1 Johns. (N. Y.) 320.

18. People v. Schwartz, 32 Cal. 160, holding that a mere averment of the company name amounted in a legal sense to an entire absence of any averment as to the party intended

of persons by a company name, unless such company is incorporated, it is decided that it is necessary to aver that the accused did the act with intent to injure the persons composing that company, stating the names of such persons.<sup>19</sup> But in a case in Indiana it is held that in an indictment for obtaining goods by false pretenses, it is sufficient to charge that the representations were made to a partnership by its firm name, and also the ownership of the property, possession of which was obtained by means of the false pretenses, to be in the partnership by its firm name.<sup>20</sup>

§ 365. Names of third persons — Amendment to correct error in.—By statute in some States an amendment may be made in the name or description of any person or body alleged to have been injured by the commission of the offense, where the variance between the name stated and that proved is not material to the merits of the case.<sup>21</sup> So it is decided under such a statute that where the name of a third person, as owner, does not go to the substance of the offense, and is a mere matter of description, and the property is otherwise fully identified and the accused placed on his defense as to which property is meant by the description, a statement as to the name of the owner may be amended by inserting the true name.<sup>22</sup> So during the progress of the trial of a per-

to be injured, for the description was not of a private individual or of private individuals under a common name, or of a corporation, or of a body politic, or of any other parties named in the statute.

19. Staaden v. People, 82 Ill. 432, citing Wallace v. People, 63 Ill. 451.

State v. Williams, 103 Ind. 235.
 Alabama.—Ross v. State, 55

Ala. 177; Ala. Rev. Code, § 4143.

Louisiana.—State v. Bright. 105

Louisiana.—State v. Bright, 105 La. Ann. 341, 29 So. 903; La. Rev. St., § 1047.

Michigan.—People v. Brown, 110 Mich. 108, 67 N. W. 1112; 2 How. Stat., § 9537. Mississippi.—Miller v. State, 53 Miss. 403; Miss. Code, 1871, § 2799.

Montana.—State v. Oliver, 20 Mont. 318, 50 Pac. 1018; Mont. Pen. Code, § 1859.

**Pennsylvania.** — Rosenberger v. Commonwealth, 118 Pa. St. 77, 11 Atl. 782.

Vermont.—State v. Casavant, 64 Vt. 405, 23 Atl. 636; Vt. Acts 1882, No. 86.

In England it was so provided by Stat. 14 and 15 Vict., chap. 100, § 1.

22. State v. Satterwhite, 52 La. Ann. 499, 26 So. 1006; State v. Haucks, 39 La. Ann. 236. son accused of murder it has been held permissible to amend the indictment by changing the christian name of the deceased as stated therein so as to comform to the proven facts in the case.<sup>23</sup> And in a case in New York where the larceny of the property of a certain bank was charged, but the corporate title of the bank was not correctly given, it was held proper to amend the indictment in this respect, it being declared that this amendment did not affect the substance of the charge against the defendant.<sup>24</sup> And in the case of assault with intent to kill and murder it has been held proper to permit an amendment by changing the surname of the person assaulted to the name shown by the proof.<sup>25</sup> So under such a provision in New York,<sup>26</sup> it is decided that where in an indictment for seduction under promise of marriage the correct surname of the female is not given, an amendment may be directed by the court to cure the defect.<sup>27</sup>

§ 366. Charging prior conviction — Second conviction changing grade of offense.—There are many cases in which a second conviction changes the grade of the offense or authorizes the infliction of an increased punishment, and where this is the case the former conviction enters as an element into the new offense and should be alleged as a necessary part of the description and char-

23. State v. Peterson, 41 La. Ann. 85, 6 So. 527, decided under La. Rev. St., § 1047. See Miller v. State, 68 Miss. 221, 8 So. 273, wherein it is held that it is proper to amend the indictment, so as to conform to the undisputed facts proved, by substituting the true christian name of the deceased for that which has been erroneously inserted by the grand jury. The court said: "The identity of the offense charged was not disturbed, and the real charge preferred by the indictment was not changed. There was no surprise to defendant by the substitution of the true christian name of the deceased, nor can we see any reason for holding that the trial of the accused was at all prejudiced thereby. The amendment appears to have been proper, and is abundantly supported by precedent in this State." Per Woods, J.

24. People v. Dunn, 53 Hun (N. Y.), 381, 6 N. Y. Supp. 805, decided under §§ 281-293, Code of Crim. Proc., and citing and following People v. Herman, 45 Hun (N. Y.), 175.

25. Miller v. State, 53 Miss. 403, decided under § 2799, Code 1871.

26. N. Y. Code of Crim. Proc., § 293.

27. People v. Johnson, 104 N. Y. 213, 10 N. E. 690.

acter of the crime intended to be punished.<sup>28</sup> This principle comes within the general rule that the facts constituting the offense

28. Georgia. — McWhorter v. State, 118 Ga. 55, 44 S. E. 873.

Iowa.—See State v. Zimmerman, 83 Iowa, 118, 49 N. W. 71.

Kentucky.—See Commonwealth v. Finn, 27 Ky. Law Rep. 771, 86 S. W. 693; Conner v. Commonwealth, 16 S. W. 454.

Massachusetts.—Commonwealth v. Walker, 163 Mass. 226, 39 N. E. 1014; Wilde v. Commonwealth, 2 Metc. 408.

Michigan.—People v. Buck, 109 Mich. 687, 67 N. W. 982.

**Missouri.**—State v. Austin, 113 Mo. 538, 21 S. W. 31.

New Hampshire. — State v Adams, 64 N. H. 440, 13 Atl. 785.

New York.—Phelps v. People, 72 N. Y. 334, 355; Wood v. People, 53 N. Y. 511; People v. Powers, 6 N. Y. 50; People v. Bosworth, 64 Hun, 72, 19 N. Y. Supp. 114; People v. Price, 6 N. Y. Cr. R. 141; People v. Youngs, 1 Caines, 37. But see Johnson v. People, 65 Barb, 42.

**Ohio.**—Blackburn v. State, 50 Ohio St. 428, 36 N. E. 18.

Pennsylvania.—Rauch v. Commonwealth, 78 Pa. St. 490.

**Texas.**—Long v. State, 36 **Tex.** 6; Kinney v. State (Tex. Cr. 1905), 84 S. W. 590; Kinney v. State, 45 Tex. Cr. 500, 78 S. W. 226, 79 S. W. 570.

Virginia.—See Satterfield v. Commonwealth, 105 Va. 867, 52 S. E. 979.

Wisconsin.—Paetz v. State (Wis. 1906), 107 N. W. 1090.

But see State v. Smith, 8 Rich. L. (S. C.) 460.

Time of raising objection.-An objection that an information for a third offense is defective in not averring prior convictions, may be raised on appeal by assignments alleging error in the charge, authorizing a conviction for a third offense. and in the sentence, imposing a punishment appropriate to such a conviction, and in excess of what could be lawfully imposed for a first conviction; and this, notwithstanding the respondent pleaded to the information before moving to quash the same for the reason stated. People v. Buck, 109 Mich. 687, 67 N. W. 982.

The second offense must be committed after a conviction of the first in order to warrant the increased punishment. People v. Butler, 3 Cow. (N. Y.) 347.

A statute is constitutional which provides for an increased penalty where there has been a prior conviction. Whorton v. Commonwealth, 7 Ky. Law Rep. 826; Sturtevant v. Commonwealth, 158 Mass. 598, 33 N. E. 648.

As affected by time of commission of first offense.—A code provision increasing the punishment where the offense charged is a second offense, has been held to apply to cases where the first offense was committed before the code went into effect. People v. Raymond, 96 N. Y. 38.

An offense will be deemed a first offense unless the contrary is charged. People v. Cook, 45 Hun (N. Y.), 34, 37.

intended to be punished should be averred,29 and that it is necessary to inform the accused of the leading grounds of the charge, so as to enable the court to pronounce the proper judgment affixed by law to the combination of facts alleged, and to enable the party to plead the judgment in bar of a second prosecution.<sup>30</sup> So in a case in Ohio it is held under a statute authorizing a sentence of imprisonment for life upon a third conviction for a felony, that to authorize such a sentence thereunder the indictment should allege that the defendant had been previously twice convicted, sentenced and imprisoned, in some penal institution for felonies, describing each separately.31 So a sentence to an increased penalty, imposed by statute upon a second conviction, cannot be rendered, except upon an allegation in the indictment, and upon proof, of a prior conviction.<sup>32</sup> And it is error on the trial of a person to introduce evidence of a former conviction for a like offense where the prior conviction is not alleged.33 But though an indictment may not contain a sufficient allegation of a prior conviction it may nevertheless be sufficient as to the new offense charged therein,34 and there may be a conviction as for a first offense.35 Again where the description of a previous conviction is found to be imperfect, inexact, or in any respect variant from the record, it is decided that under a statute so providing it may be amended so as to conform to the record, without the formality of sending the case back to the grand jury, to find a new indictment.36

29. Tuttle v. Commonwealth, 2 Gray (Mass.), 505.

**30**. Phelps v. People, 72 N. Y. 334, 355. Per Folger, J.

**31.** Blackburn v. State, 5 Ohio St. 428, 36 N. E. 18.

32. Tuttle v. Commonwealth, 2 Gray (Mass.), 505. It was said in this case: "When the statute imposes a higher penalty upon a second and a third conviction, respectively, it makes the prior conviction of a similar offense a part of the description and character of the offense intended to be punished; and therefore

the fact of such prior conviction must be charged as well as proved." Per Shaw, C. J.

33. Long v. State, 36 Tex. 6.

34. State v. Dorr, 82 Me. 341, 19 Atl. 861, so holding where an indictment stated the time of the prior conviction as in the year 1088.

35. Palmer v. People, 5 Hill (N. Y.), 427, so holding where an indictment for petit larceny described it as a second offense, and citing People v. Jackson, 3 Hill (N. Y.), 92, as sustaining the decision.

36. Commonwealth v. Holley, 3

§ 367. Same subject — Sufficiency of averment.—The previous conviction need not be set forth in extenso, it being sufficient if the indictment set forth the conviction with such particularity as to identify it and indicate the character of the offense charged, and if it also set forth the sentence with such exactness as to show that it brings the accused within the law for additional punishment.<sup>37</sup> And where a statute provides for an increased punishment for a second conviction for a felony it is sufficient to charge that the prior conviction was for a felony, without alleging the particular offense.<sup>38</sup>

§ 368. Same subject — As to jurisdiction of prior offense.— It is held to be essential in such a case that the indictment should not only allege the prior conviction but should also state such facts as show that the court before whom the first conviction was had, possessed jurisdiction as well of the subject matter as of the person of the prisoner.<sup>39</sup> But it has been held sufficient in an indictment

Gray (Mass.), 458, holding that a statute so providing is not in violation of the declaration of rights which provides that no subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally described to him.

37. Wilde v. Commonwealth, 2 Metc. (Mass.) 408.

**Technical accuracy** in setting forth record of a prior conviction not essential. See State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688.

It is not necessary to show the punishment actually suffered, it being sufficient to charge the prior conviction. Brown v. Commonwealth, 22 Ky. Law Rep. 1582, 61 S. W. 4, decided under Ky. St., § 1130.

38. Whorton v. Commonwealth, 7 Ky. Law Rep. 826.

39. People v. Powers, 6 N. Y. 50,

so holding in the case of an indictment for the second offense of petit larceny. The court said: "The indictment in this case, in order to show a conviction of the prisoner for the first offense, in due form, should have, preliminary to the statement of his trial and conviction, stated the charge made against him before the justice and in what form, the proceedings had before him upon it and the issuing of the process thereon, his arrest and being brought before the justice; showing thereby that there was a charge for petit larceny made in due form against him, and legal process issued for his arrest was arrested, that he brought before the justice and elected to be tried for the offense charged before the justice, pursuant to the provisions of the statute in such cases. Such allegations would have shown

for petit larceny, charged as a second offense, to aver, generally, that the court before which the defendant was convicted, had full and competent authority and power in the premises, without setting forth the particular facts showing jurisdiction.<sup>40</sup>

§ 369. Same subject — Statute making it unnecessary to allege prior conviction - Constitutionality of. - It is provided by the constitution in most of the States that the accused is entitled to be informed of the nature and cause of the accusation against him.41 Under such a provision it is necessary that the constituent elements of the offense shall be set out so that the accused may be enabled to properly prepare his defense and to plead a judgment of acquittal or conviction in bar of a second prosecution. right so secured requires that where it is sought to convict a person of a second offense carrying with it an increased punishment, it is essential to properly set out the first conviction in the indictment, and it is not within the power of the Legislature to provide that in an indictment for a second offense it shall not be necessary to allege the prior conviction. So in Massachusetts it has been decided that a statutory provision that in complaints for drunkenness it shall not be necessary to allege previous convictions, though the penalty in such a case is increased, is in conflict with the provision of the declaration of rights in that State that no subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally described to him. 42 in Louisiana it is decided that, under the statute permitting the judge to increase the penalty for a second or third offense. previous convictions should not be charged, as they are not essential ingredients of the offense charged and might prejudice the jury, but that after verdict the State may inform the judge, or he may act upon his own suggestion, in respect to previous convictions. 43

jurisdiction in the justice of the subject matter and of the person of the prisoner." Per JEWETT, J.

See also People v. Cook, 2 Park. Cr. R. (N. Y.) 12.

Compare Satterfield v. Commonwealth, 105 Va. 867, 52 S. E. 979.

- **40.** People v. Golden, 3 Park. Cr. R. (N. Y.) 330.
  - 41. See § 237 herein.
- 42. Commonwealth v. Harrington, 130 Mass. 35.
  - 43. State v. Hudson, 32 La. Ann.

## § 370 Charging the Offense—Particular Averments.

§ 370. Same subject — Averment as to discharge — Sentence. —Where a statute makes an offense an aggravated one where committed after a former conviction of an offense punishable by imprisonment in a State prison, and a discharge "either upon being pardoned, or upon the expiration of his sentence," upon such conviction, the discharge in one of the ways mentioned in the statute becomes a material fact which must be alleged as well as the conviction.<sup>44</sup> And where a statute provided for an increased punishment where the accused has been convicted and sentenced for a like offense it is necessary to aver not only a conviction but also a sentence.<sup>45</sup>

1052. See also State v. Smith, 8 Rich. L. (S. C.) 460.

44. Wood v. State, 53 N. Y. 511; Stevens v. People, 1 Hill (N. Y.), 261. See Evans v. Commonwealth, 3 Metc. (Mass.) 453; State v. Austin, 113 Mo. 538, 21 S. W. 31; Gibson v. People, 5 Hun (N. Y.), 542, as to sufficiency of allegation of discharge.

**45**. People v. Ellsworth, 68 Mich. 496, 36 N. W. 236.

## CHAPTER XIII.

## Charging the Offense — Statutory Offenses.

- Section 371. Statutory offenses-General rule as to charging in language of statute.
  - 372. Qualification of general rule as to charging offense in words of statute.
  - 373. Same subject continued-Where statute employs general or comprehensive words.
  - 374. Offense must be brought within words of statute.
  - 375. Same subject-Illustration of rule.
  - 376. Must apprise defendant with reasonable certainty of nature of accusation.
  - 377. Same subject-Sufficient if words used make charge clear-Surplusage.
  - 378. Offense composed of several elements or multiplicity of acts.
  - 379. Same subject-Rule in New York.
  - 380. Use of common law form in charging offense.
  - 381. Use of words equivalent to those of statute.
  - 382. Where statute is in disjunctive—Use of conjunctive.
  - 383. Recital of statute on which indictment based not necessary.
  - 384. Effect of misrecitals as to statute.
  - 385. Misrecitals of statutes—Effect of conclusion.
  - 386. Private statutes—Recitals as to.
  - 387. Indictment not sufficient under statute pleader had in view but good under another statute.
  - 388. Where several amendments to statute.
  - 389. Rule as to charging statutory misdemeanors.
  - 390. Exceptions in statute-General rule.
  - 391. Same subject-Application of rule.

Sec. 371. Statutory offenses - General rule as to charging in language of statute.—It may be stated generally, that it is ordinarily sufficient for an indictment or information to charge a statutory offense in the language of the statute where by so doing the accused is sufficiently apprised of the nature and cause of the accusation against him.¹ So it is said that while it is not always sufficient to charge an offense in the language of the statute, yet

1. United States.—United States v. Ballard, 118 Fed. 757; United States v. Henry, 26 Fed. Cas. No. 15,350, 3 Ben. 29.

Alabama.—State v. Briley, 8 Port. (Ala.) 472.

Arkansas.—State v. Culbreath, 71 Ark. 80, 71 S. W. 254.

California,—People v. Keeley, 81 Cal. 210, 22 Pac. 593; People v. Russell, 80 Cal. 616, 23 Pac. 418; People v. White, 34 Cal. 183.

Connecticut.—State v. Cady, 47 Conn. 44.

**Georgia.**—Glover v. State (Ga. 1906), 55 S. E. 592; Hines v. State, 26 Ga. 614.

Idaho.—People v. Butler, 1 Ida. 231.

Illinois.—Gallagher v. People, 211 Ill. 158, 71 N. E. 842; Bolen v. People, 184 Ill. 338, 56 N. E. 408; Brennan v. People, 113 Ill. App. 361; Ward v. People, 23 Ill. App. 510.

Indiana.—State v. Beach, 147 Ind. 47, 46 N. E. 145, 36 L. R. A. 179; Benham v. State, 116 Ind. 112, 18 N. E. 454; State v. New (Ind. App. 1905), 76 N. E. 181.

Iowa.—State v. Beebe, 115 Iowa, 128, 88 N. W. 358; State v. Grant, 86 Iowa, 216, 53 N. W. 120; State v. Smith, 46 Iowa, 670; Romp v. State, 3 G. Greene, 276.

Kansas.—State v. Blakesley, 39 Kan. 152, 18 Pac. 170.

Kentucky.—Commonwealth v. Chesapeake & Ohio Railway Company, 101 Ky. 159, 40 S. W. 250; Commonwealth v. Bryant, 11 Ky.

Law Rep. 426, 12 S. W. 276; Mitchell v. Commonwealth, 10 Ky. Law Rep. 910, 11 S. W. 209;

Louisiana.—State v. Alexander, 113 La. 747, 37 So. 711; State v. Souier, 107 La. Ann. 794, 32 So. 175; State v. Holmes, 40 La. Ann. 173, 3 So. 564.

Maine.—State v. Doran, 99 Me. 329, 54 Atl. 440, 105 Am. St. Rep. 278; State v. Snowman, 94 Me. 99, 46 Atl. 815, 80 Am. St. Rep. 380, 50 L. R. A. 544.

Maryland.—Kearney v. State, 48 Md. 16; Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522.

Massachusetts.—Commonwealth v. Dewhirst, 190 Mass. 293, 76 N. E. 252; Commonwealth v. Malloy, 119 Mass. 347; Commonwealth v. Connelly, 163 Mass. 539, 40 N. E. 862; Commonwealth v. Prescott, 151 Mass. 69, 23 N. E. 729.

Michigan.—Rice v. People, 15 Mich. 9.

Minnesota.—State v. Abrisch, 41 Minn. 41.

Missouri.—State v. Keutner, 178 Mo. 487, 77 S. W. 522; State v. Adams, 108 Mo. 208, 18 S. W. 1000; State v. Murphy, 49 Mo. App. 270; State v. Smith, 24 Mo. App. 413; State v. Walker, 24 Mo. App. 679.

Nebraska.—Peterson v. State, 64 Neb. 875, 90 N. W. 964.

New Hampshire.—State v. Keneston, 59 N. H. 36; State v. Rust, 35 N. H. 438.

New Jersey.—Bassette v. State, 51 N. J. L. 502, 18 Atl. 354; State v. Halsted, 39 N. J. L. 402.

when the words of the statute creating the offense plainly indicate the nature of the crime it is sufficient to charge the offense

New York.—Phelps v. People, 72 N. Y. 334; People v. Higbie, 66 Barb. (N. Y.) 131.

North Carolina.—State v. Stanton, 23 N. C. 424; State v. Howe, 100 N. C. 449, 5 N. E. 671.

**Oregon.**—State v. Light, 17 Or. 358, 21 Pac. 132.

South Carolina.—State v. Williams, 2 Strobh. (S. C.) 474.

Tennessee.—Harrison v. State, 42 Tenn. 232.

Texas.—Longley v. State, 42 Texas, 490.

**Utah.**—State v. Swan (Utah, 1906), 88 Pac. 12; State v. Williamson, 22 Utah, 248, 62 Pac. 1022, 83 Am. St. Rep. 780.

Vermont.—State v. Daly, 41 Vt. 564.

Washington.—State v. Tiffany (Wash. 1906), 87 Pac. 932.

West Virginia.—State v. Riffe, 10 W. Va. 794.

Wyoming.—Edelhoff v. State, 5 Wyo. 19, 36 Pac. 627.

Further citations showing application of rule.—The rule that charging an offense in the language, or in substantially the language, of the statute has been applied in the case of an information charging the offense of aiding a prisoner to escape (People v. Murray, 57 Mich. 396, 24 N. W. 118); assault with a deadly weapon (People v. Savercord, 81 Cal. 650, 22 Pac. 856); an indictment for assault with intent to inflict bodily injury (Murphy v. State, 43 Neb. 34, 61 N. W. 941; attempted abor-

tion (Scott v. People, 141 Ill. 195, 30 N. E. 329); attempt to bribe a witness (State v. Taylor, 44 La. Ann. 967, 11 So. 576); breaking into a building used in part as a post office (United States v. Williams, 57 Fed. 201); compounding a felony (Watt v. State, 97 Ala. 72, 11 So. 901); embezzlement (State v. Trolson, 21 Nev. 419, 32 Pac. 930); an information disturbance of the peace (State v. Ramsey, 52 Mo. App. 668); an indictment of a county clerk for failure to publish a report (Moose v. State, 49 Ark. 499, 5 S. W. 885); of a parent for failure to support a child (State v. Kerby, 110 N. C. 558, 14 S. E. 856); for intercourse with an unmarried female under a certain age (Holton v. State, 28 Fla. 303, 9 So. 716); for keeping a disorderly liquor shop (State v. Hoard, 123 Ind. 34, 23 N. E. 972); for keeping a house of ill-fame (State v. Osgood, 85 Me. 288, 27 Atl. 154); for laboring on Sunday (Clearly v. State, 56 Ark. 124, 19 S. W. 313); mayhem (United States v. Gunther, 5 Dak. 234, 38 N. W. 79; Kitchens v. State, 80 Ga. 810, 7 S. E. 209); murder (People v. Murray, 10 Cal. 309); practicing medicine without a license (Benham v. State, 116 Ind. 112, 18 N. E. 454); profane swearing (Bodenhamer v. State, 60 Ark. 10, 28 S. W. 507); seduction (State v. Framness, 43 Minn. 490, 45 N. W. 1098); taking excessive compensation in collection of pension claim (United States v. Reynolds, 48 Fed. 215); an information for vagsubstantially in the words of the act.<sup>2</sup> And in a recent case in Florida the doctrine is affirmed that an indictment which is in language substantially the same, or of the same import, as that required by the statute is sufficient where it fully acquaints the accused with the "nature and cause" of the accusation against him as required by the constitution.<sup>3</sup> And the rule is stated in words of similar import in other decisions.<sup>4</sup> In a case in New York

rancy (State v. Preston, 4 Ida. 215, 38 Pac. 694); and indictments for violating intoxicating liquor laws (Cost v. State, 96 Ala. 60, 11 So. 436; Skinner v. State, 120 Ind. 127, 22 N. E. 115; State v. Meagher, 49 Mo. App. 571).

It is a general rule that in indictments for offenses created by statute, it is sufficient to follow the exact words of the statute in describing the offense. State v. West, 10 Tex. 553.

The general rule as to statutory offenses is that, if the statute so far individuates the crime, the offender has proper notice from the terms of the particular offense intended to be covered, it is sufficient to charge it in the language of the statute. State v. Kendig, 133 Iowa, 164, 110 N. W. 463. Per DEEMER, J., citing State v. Johnson, 114 Iowa, 430, 87 N. W. 279; State v. Beebe, 115 Iowa, 128, 88 N. W. 358; State v. Bangness, 106 Iowa, 107, 76 N. W. 508; State v. Dankwardt, 107 Iowa, 704, 77 N. W. 495.

An indictment for forgery in the first degree in New York which in its several counts closely conforms to the language of the statute defining the crime of forgery in the first degree is good. People v. Alderdice, 120 App. Div. (N. Y.) 368, citing People v. Herlihy, 66 App. Div. (N. Y.) 540, 73 N. Y. Supp. 236; People v. Adams, 85 App. Div. (N. Y.) 390, 83 N. Y. Supp. 481, 176 N. Y. 351, 66 N. E. 636; People v. Williams, 149 N. Y. 1, 43 N. E. 407.

Indictment for manslaughter by negligent use of machinery, under New York Penal Code, § 195. As to sufficiency of, see People v. Smith, 56 Misc. R. (N. Y.) 1. The indictment in this case was against one as vice-president and general manager of a railroad for culpable negligence under above act for the running of a railroad train at a dangerous rate of speed around a curve by reason of which the train left the rails and was wrecked, causing the death of a passenger.

- State v. Van Wye, 136 Mo. 227,
   S. W. 938, 58 Am. St. Rep. 627.
   Per Gantt, J.
- 3. Stutts v. State (Fla. 1906), 42 So. 51.
- 4. Where a statute creates an offense and describes its constituents, or the facts that constitute the offense, then it will be sufficient to charge the offense in the language of the act. Batre v. State, 18 Ala. 119.

Where a statute is introductive of

it is said in this connection that "the general rule is well settled, that an indictment for a statutory offense, and especially when the offense is a misdemeanor, charging the facts constituting the crime, in the words of the statute, and containing averments as to time, place, person, and other circumstances to identify the particular transaction, is good as a pleading and justifies putting the defendant on trial."5 So it is said in a recent case in Illinois: "Every indictment found by a grand jury shall be deemed sufficiently technical and correct which alleges and charges the offense in the language of the statute creating the offense, or so charges the offense that it may be understood by the jury. This has been so frequently announced by this court that it is almost unnecessary to cite authorities." In the application of the general rule that in an indictment or information it is sufficient to charge the offense in the words of the statute it is decided that where the defendant

a new offense, and prescribes its constituents without reference to anything else—in an indictment founded upon it, it is sufficient to describe the offense in the term of the act. State v. Duncan, 9 Port. (Ala.) 260.

Where a statute embraces all the ingredients of the offense intended to be punished, and the language used describes such offense with legal certainty, an indictment or complaint may charge the offense in the words of the statute. Commonwealth v. Malloy, 119 Mass. 347.

Where a statute states the elements of a crime, it is generally sufficient in an information or indictment to describe such crime in the language of the statute. Cordson v. State (Neb. 1906), 109 N. W. 764, citing Leisenberg v. State, 60 Neb. 628, 84 N. W. 6; Chapman v. State, 61 Neb. 888, 86 N. W. 907; Wagner v. State, 43 Neb. 1, 61 N. W. 85; State v. Lauver. 26

Neb. 757, 42 N. W. 762; State v. Davis, 70 Mo. 467.

We are of the opinion that where the offense charged is purely statutory, having no relation to the common law, it is, as a general rule, sufficient in the indictment to charge the defendant with the act coming fully within the statutory description, in the substantial words of the statute without any further expansion of the matter. State v. Williamson, 22 Utah, 248, 62 Pac. 1022, 83 Am. St. Rep. 780. Per Minor, J.

5. People v. West, 106 N. Y. 293, 295. Per Andrews, J., citing Wharton's Cr. Law, § 364; People v. Taylor, 3 Den. (N. Y.) 91; see also People v. Webster, 17 Misc. (N. Y.) 410, 413, 40 N. Y. Supp. 1135, quoting the above language.

6. Bolen v. People, 184 Ill. 338, 56 N. E. 408. Per Phillips, J., citing Graham v. People, 181 Ill. 477, 55 N. E. 179. insists upon greater particularity, he must show that the case falls within some exception to the general rule.

§ 372. Qualification of general rule as to charging offense in words of statute.—Although it is said that there can be no safer rule for the pleader to follow, than that he should set forth the offense in the language of the statute, between yet stating an offense in the words of the statute is not sufficient unless every fact necessary to constitute the offense is charged or necessarily implied by following the words used therein. In those cases where the language of a statute creating a new offense does not describe the act or acts constituting such offense the pleader is bound to set them forth specifically. And it is a general rule that where the statute does not sufficiently define or describe the offense created therein it is essential that the indictment thereunder should set forth the acts constituting the offense so that the accused may be informed of the nature of the accusation against him. So it

7. Whiting v. State, 14 Conn. 487, 36 Am. Rep. 499; Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522; Riley v. State, 43 Miss. 397; United States v. Henry, 26 Fed. Cas. No. 15,350.

It is a well settled general rule that, in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute, and if, in any case, the defendant insists upon a greater particularity, it is for him to show that from the obvious intention of the legislature, or the known principles of the law, the case falls within some exception to such general rule. But few exceptions to this rule are recognized. Lemon v. State, 19 Ark. 171. Per Hemly, J.

Where the offense created by statute is described in the words of the statute, and the words were sufficient for an intelligent verdict and judgment, the prisoner must show that the other omitted averments are necessary to insure a fair trial or reasonable protection against further prosecution. State v. Lockbaum, 38 Conn. 400.

- 8. Smith v. State, 34 Texas, 612.
- 9. Commonwealth v. Stout, 7 B. Mon. (Ky.) 247.
  - 10. Johnson v. People, 113 Ill. 99.
- v. Beatty, 60 Fed. 740; United States v. Wardell, 49 Fed. 914; United States v. Trumbull, 46 Fed. 755; United States v. Grimm, 45 Fed. 558.

Alabama.—May v. State, 85 Ala. 14, 5 So. 14; Anthony v. State, 29 Ala. 27.

Arkansas.—State v. Graham, 38 Ark. 519.

has been declared by the United States Supreme Court that in an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case without that intent.<sup>12</sup> This general rule is also affirmed in numerous other decisions in

California.—People v. Neil, 91 Cal. 465, 27 Pac. 760.

Connecticut.—State v. Jackson, 39 Conn. 229.

**Florida.**—Cook v. State, 25 Fla. 698, 6 So. 451.

**Georgia.**—Sanders v. State, 86 Ga. 717, 12 S. E. 1058.

Indiana.—Stropes v. State, 120 Ind. 562, 22 N. E. 773; Bowles v. State, 13 Ind. 427.

Kentucky.—Commonwealth v. Cook, 52 Ky. 149; Commonwealth v. Ward, 13 Ky. Law Rep. 422, 17 S. W. 283.

Maine.—State v. Doran, 99 Me. 329, 59 Atl. 440; State v. Symonds, 57 Maine, 148.

Massachusetts.—Tully v. Commonwealth, 4 Metc. (Mass.) 357.

Minnesota.—State v. Farrington, 59 Minn. 147, 60 N. W. 1088, 28 L. R. A. 395.

Mississippi.—Sullivan v. State, 47 Miss. 346, 7 So. 275; Kliffield v. State, 5 Miss. 304.

Missouri.—State v. Kueger, 134 Mo. 262, 35 S. W. 604; State v. Brown, 8 Mo. 210.

New York .- People v. Kane, 61

N. Y. Supp. 632, 14 N. Y. Cr. R. 316;
Enright v. People, 21 How. Prac. 383;
People v. Taylor, 3 Den. 91;
People v. Wilber, 4 Park. Cr. R. 19.

North Carolina.—State v. Howe, 100 N. C. 499, 5 S. E. 671, State v. Credle, 91 N. C. 640.

Ohio.—Lamberton v. State, 11 Ohio, 282.

**Oregon.**—State v. Lee, 17 Oreg. 488, 21 Pac. 455; State v. Packard, 4 Oreg. 157.

Pennsylvania.—Commonwealth v. Fohnestack, 15 Pa. Co. Ct. R. 598, 4 Pa. Dist. R. 297.

Tennessee.—Cornell v. State, 66 Tenn. 520.

**Vermont.**—State v. Fiske, 66 Vt. 434, 29 Atl. 633; State v. Higgins, 53 Vt. 191.

West Virginia.—State v. Mitchell, 47 W. Va. 789, 35 S. E. 845.

12. United States v. Carll, 105 U. S. 611, Justice Gray, citing United States v. Cruikshank, 92 U. S. 542; United States v. Simmons, 96 U. S. 360; Commonwealth v. Clifford, 8 Cush. (Mass.) 215; Commonwealth v. Bean, 14 Gray (Mass.), 52; Commonwealth v. Filburn, 119 Mass. 294.

the Federal and State courts.<sup>13</sup> And in an early case in the United States Supreme Court, it is said by Justice Story in this connection: "In general, it may be said, that it is sufficient certainty in an indictment to allege the offense in the very terms of the statute. We say, in general, for there are doubtless cases where more particularity is required, either from the obvious intention of the legislature, or from the application of known principles of law. At the common law, in certain descriptions of offenses, and especially of capital offenses, great nicety and particularity are often necessary. The rules which regulate this branch of pleading were sometimes founded in considerations which no longer exist either in our own or in English jurisprudence; but a rule being once established, it still prevails, although if the case were new, it might not now be incorporated into the law. So, again in certain classes of statutes the rule of very strict certainty has sometimes been applied where the common law furnished a close and appropriate analogy. Such are the cases of indictments for false pretences, and sending threatening letters, where the pretence and the letters are required to be set

13. United States.—In an indictment upon a statute while the language of the statute may be used in the general description of an offense, it should be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense with which he is charged. United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, citing States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

See, also, Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 939, 38 L. Ed. 830; United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516.

Alabama.—While the general rule is, that where a new offense is created

by statute, an indictment describing the offense in the language of the statute, or in words conveying the same meaning, is good, this is not sufficient, if such indictment fails to allege the fact, in the doing or not doing of which the offense consists. Grattan v. State, 71 Ala. 344.

"In framing an indictment upon a statute creating an offense, it is not always enough to charge the offense in the language of the act, for such a charge may not allege the fact or facts which constitute the offense, which must always be done, whether the offense be created by statute, or whether it existed at the common law." Batre v. State, 18 Ala. 119, 122. Per Dargan, J., citing Turnipseed v. State, 6 Ala. 664; State v. Brown, 4 Port. (Ala.) 413; State v.

forth from the close analogy to indictments for perjury and forgery. Courts of law have thought such certainty not unreasonable or inconvenient, and calculated to put the plea of autre fois acquit, or convict, as well as of general defence at the trial, fairly within the power of the prisoner. But these instances are by no means considered as leading to the establishment of any general rule. On the contrary, the course has been to leave every class of cases to be decided very much upon its own peculiar circumstances. Thus in cases of conspiracy, it has never been held necessary to set forth the overt acts or means, though these might materially assist the prisoner's defence. So, in cases of solicitation to commit crimes, it has been held sufficient to state the act of solicitation, without any averment of the special means. And in endeavors to commit a revolt, which is by statute in England made a capital offence, it has always been deemed sufficient to allege the offence in the words of the statute, without setting forth any particulars of the manner or the means. These cases approach very near to the present; and if any, by way of precedent, ought to govern it, they well may govern it. The case of treason

Worrell, 12 Ala. 732; Williams v. State, 15 Ala. 260.

Arkansas.—It is sufficient, as a general rule, to charge a statutory offense in the words of the statute; but when a more particular statement of the facts is necessary to set it forth with requisite certainty they must be averred. State v. Graham, 38 Ark. 519.

Illinois.—It is only when the statute itself does not define the nature of the offense sufficiently to notify the defendants of the crime with which they are charged, that the allegation in the words of the statute will be held insufficient. Gallagher v. People, 211 Ill. 158, 166, 71 N. E. 842.

Indiana.-Where the statute de-

fines the crimes generally without naming the particular acts constituting it it is necessary in charging the offense to set out the acts done. Malone v. State, 14 Ind. 219.

Kentucky.—An indictment in the words of a statute is not always sufficient. Whether sufficient or not, depends upon the manner of stating the offense in the statute. If every fact necessary to constitute the offense is charged or necessarily implied by following the language of the statute, the indictment in the words of the statute, is undoubtedly sufficient, otherwise it is not. Commonwealth v. Stout, 46 Ky. 247, per Judge SIMPSON, cited with approval in State v. Campbell, 29 Texas, 44, 46.

Maine.—If a statute creating an

stands upon a peculiar ground; there the overt acts must, by statute, be specially laid in the indictment and must be proved as laid. The very act and mode of the act must, therefore, be laid as it is intended to be proved." So a statute may be so inaccurately penned, that its language does not express the whole meaning the legislature had, and by construction, its sense is extended beyond its words in which case, the indictment must contain such averments of other facts, not expressly mentioned in the statute, as will bring the case within the true meaning of

offense fails to set out the facts constituting it sufficiently to apprise the accused of the precise nature of the charge against him, a more particular statement of the facts will be required in the indictments. State v. Doran, 99 Maine, 329, 54 Atl. 440, 105 Am. St. Rep. 278, per Whitehouse, J.

Mississippi.—Though, as a general rule, it is sufficient to charge a statutory offense in the words of the statute, yet this rule does not apply where there are, in the language of the statute, no sufficient words to define any offense. Harrington v. State, 54 Miss. 490, 494. Per CHALMERS, J.

Missouri.—The general rule only applies where all the facts which constitute the offense are set forth in a statute. State v. Krueger, 134 Mo. 262, 35 S. W. 604, citing State v. Hayward, 83 Mo. 304; State v. Davis, 70 Mo. 467; State v. Kesslering, 12 Mo. 565; State v. Peirce, 43 N. H. 273.

**Texas.**—As a general rule, it is sufficiently certain to describe an offense in an indictment in the language of the act creating the offense; but there are cases where more par-

ticularity is required, either from the obvious intention of the legislature. or from the application of known principles of law. Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258. DONLEY, J. In another case in Texas it is said that there are many exceptions to the general rule: instance, 'if extrinsic facts be necessary to bring the act within the statute they must be averred.' Burch v. State, 1 Tex. 608; West v. State, 10 Tex. 553; Brewer v. State, 5 Tex. App. 248; Vaughn v. State, 9 Tex. App. 563. And if a penalty be announced for the commission or omission of an act under certain circumstances, the indictment must charge the commission or omission under the circumstances specified. State v. Wupperman, 13 Tex. 33. And if a statute creates an offense composed of different constituents, each constituent being in itself an offense, the indictment must specify the particular constituents relied on, with accuracy." Kerry v. Slate, 17 Tex. App. 178, 50 Am. Rep. 122. Per White, J., citing State v. Williams, 14 Tex. 98.

14. United States v. Gooding, 25 U. S. 460, 475, 6 L. Ed. 693, per Justice Story. the statute; that is, the indictment must contain such words as ought to have been used in the statute, if the legislature had correctly expressed therein their precise meaning.<sup>15</sup>

§ 373. Same subject continued - Where statute employs general or comprehensive words.—Where the statute employs a general term, very broad in its comprehension, to designate and describe the objects to be protected by it, it is necessary in such case to specify the particular species or class in respect to which the offence is charged. It is not sufficient to charge an offense in the words of the statute creating it where such words are so broad and general as to include therein acts which clearly it was not the intention of the legislature to include.<sup>17</sup> So it is said that "the principal exception to this general rule respecting statutory offenses, is where the words of the statute may, by their generality, embrace cases falling within its literal terms which are not within its meaning and spirit." 18 So where by statute it is an indictable offense to aid or assist a prisoner in escaping and by the literal construction of the statute it would include any person, however innocent, who might do an act the effect of which would be to aid

State v. Stanton, 23 N. C. 424.
 State v. Credle, 91 N. C. 640,
 Per Merrimon, J. See also Territory
 Hubbell (N. M. 1906), 86 Pac. 747.

There is an exception in respect to the rule that an indictment is sufficient which follows the exact words of the statute in those cases where an indictment uses generic terms, in which case it is necessary to state the species, according to the truth of the case; and where the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary besides charging the offense in the words of the statute, to aver such facts and circumstances as may be necessary to

bring the matter within the meaning of it. State v. West, 10 Tex. 553. Per Wheeler, J., citing Archibald's C. Pl. 46, 47; Bush v. Republic, 1 Tex. 455; Burch v. Republic, 1 Tex. 608.

The general rule has no application where the statute creates an offense by generic terms. In such case an information or indictment following the statute would be defective. The facts constituting the particular offense must always be pleaded. State v. Seeley, 65 Kan. 185, 69 Pac. 163; per Greene, J.

17. Schmidt v. State, 78 Ind. 41; State v. Goulding, 44 N. H. 284.

18. State v. Breice, 27 Conn. 319. Per Storms, J.

an escape, a charging of the offense in the words of the statute is not sufficient and a further description is necessary.<sup>19</sup>

§ 374. Offense must be brought within words of statute.— The general rule that nothing material is to be taken by intendment applies to the charging of a statutory offense,<sup>20</sup> and it is essential to the sufficiency of an indictment or information therefor that in charging such offense the defendant should be brought within all the material words of the statute descriptive thereof.<sup>21</sup>

King v. State, 42 Fla. 260, 28
 206.

20. Humphreys v. State, 17 Fla. 386; Kearney v. State, 48 Md. 16; People v. Albow, 140 N. Y. 130, 35 N. E. 438, 55 N. Y. St. R. 253, rev'g 71 Hun, 123, 24 N. Y. Supp. 519, 53 N. Y. St. R. 869; Kit v. State, 11 Humph. (Tenn.) 167.

21. United States.—Re Greene, 52 Fed. 104; United States v. Greenhut, 50 Fed. 469; United States v. Smith, 45 Fed. 561.

Alabama.—Tennyson v. State, 97 Ala. 78, 12 So. 391; Copeland v. State, 97 Ala. 30, 12 So. 181; Giles v. State, 89 Ala. 50, 8 So. 121; Underderwood v. State, 19 Ala. 532.

California.—People v. Eppinger, 105 Cal, 36, 38 Pac. 538.

**Dakota.**—United States v. Carpenter, 6 Dak. 294.

Florida.—Humphreys v. State, 17 Ila. 386.

**Georgia.**—Kiser v. State, 89 Ga. 421, 15 S. E. 495; McDuffie v. State, 87 Ga. 687, 13 S. E. 586.

Illinois.—Kincaid v. People, 139 Ill. 213, 28 N. E. 1060.

Indiana.—Blough v. State, 121 Ind. 355, 23 N. E. 153.

Kentucky.-Waller v. Common-

wealth, 97 Ky. 509, 30 S. W. 1023; Commonwealth v. Bell, 17 Ky. Law Rep. 277, 30 S. W. 997.

Louisiana.—State v. Langston, 45 La. Ann. 1182, 14 So. 137; State v. Johnson, 42 La. Ann. 559, 7 So. 588.

Maine.—State v. Dunlap, 81 Me. 389, 17 Atl. 313.

Maryland.—Kearney v. State, 48 Md. 16.

Michigan.—People v. Cronin, 80 Mich. 646, 45 N. W. 479.

Mississippi.—Newman v. State, 69 Miss. 303, 10 So. 580.

Missouri.—State v. Rosenblatt, 185 Mo. 114, 83 S. W. 975; State v. Sills, 56 Mo. App. 408; State v. Baskett, 52 Mo. App. 389; State v. Bragg, 51 Mo. App. 334; State v. Greenhogen, 36 Mo. App. 24; State v. Ryan, 30 Mo. App. 159.

New Mexico.—Territory v. Armijo, 7 N. M. 571, 37 Pac. 1117.

New York.—People v. Lowndes, 130 N. Y. 455, 29 N. E. 751, 42 N. Y. St. R. 360; People v. Olmsted, 74 Hun, 323, 26 N. Y. Supp. 818, 56 N. Y. St. R. 311.

Oreg. 236, 25 Pac. 638.

Pennsylvania.—Commonwealth v. Clark, 2 Ashm. 105; Commonwealth

Where the crime is statutory, it is essential that the indictment should charge with certainty and precision all the facts necessary

v. Morningstar, 12 Pa. Co. Ct. R. 34, 2 Pa. Dist. R. 41.

**South Carolina.**—State v. Williams, 32 S. C. 123, 10 S. E. 876.

Tennessee.—Kit v. State, 11 Humph. 167.

**Texas.**—Patton v. State, 31 Tex. App. 20, 19 S. W. 252; Lamar v. State, 30 Tex. App. 693, 18 S. W. 788; Blackwell v. State, 30 Tex. App. 672, 18 S. W. 676.

Washington.—State v. Brown, 7 Wash. 10, 34 Pac. 132.

It is a well settled rule of criminal pleading that an indictment for an offense created by statute must describe the offense in the words of the statute, or in words of similar import. Conner v. Commonwealth, 13 Bush (Ky.), 714. Per COOPER, J.

"The general rule is that the charge must be laid in the indictment so as to bring the case within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it. Nothing is to be left to implication or intendment." State v. Eldridge, 12 Ark. 608. Per Johnson, J.

The statute should be followed.

Ohio.—Poage v. State, 3 Ohio St.
229.

**Pennsylvania.**—Hamilton v. Commonwealth, 3 Pa. 142; Updegraff v. Commonwealth, 6 Serg. & R. (Pa.) 5.

South Carolina.—State v. Foster, 3 McC. L. (S. C.) 442; State v. O'Bannon, 1 Bailey (S. C.), 664; State v. Casados, 1 Nott. & M. (S. C.) 91.

Texas.—Drummond v. Republic, 2 Tex. 156.

Virginia.—Howell v. Commonwealth, 5 Gratt. (Va.) 664.

This is not, however, to be construed as meaning that the exact words of the statute must be used. See § 381 herein.

In New York it is held that in framing an indictment on a statute all the circumstances which constitute the definition of the crime in the statute, so as to bring the accused precisely within it, must be stated, but no other description of the manner in which the offense was committed is necessary than that contained in the statute. People v. Williams, 92 Hun (N. Y.), 354, 71 N. Y. St. R. 541, affd. 149 N. Y. 1, citing People v. Phelps, 72 N. Y. 334, 349; Eckhardt v. People, 83 N. Y. 462; People v. West, 106 N. Y. 293; People v. Weldon, 111 N. Y. 569, 574; People v. King, 110 N. Y. 418; People v. Rockhill, 74 Hun (N. Y.), 241; People v. Flaherty, 79 N. Y. 48; United States v. Hess, 124 U.S. 8 Sup. Ct. 571, 31 L. Ed. And in an earlier case in this State it is held that an indictment upon a statute must state all such facts and circumstances as constitute the statute offense, so as to bring the party indicted closely within the provisions of the statute. If the statute is confined to certain classes of persons, or to acts done at some particular time or place, the indictment must show that the party indicted, and the time and place when the alleged criminal to constitute the offense and it must conform to the language or state all the facts which bring it within the terms of the statute.

acts were perpetrated, were such as to bring the supposed offender directly within the statute. People v. Allen, 5 Den. (N. Y.) 76, 79. Per BEARDS-LEY, J.

Where an essential element of the statutory offense of planting oysters is that it be done on account or for the benefit of the person doing it, or for the benefit of a non-resident employer, the failure to charge that fact in an indictment for such offense is a substantial omission, rendering the indictment fatally defective. People v. Lowndes, 130 N. Y. 455, 42 N. Y. St. R. 360, rev'g 55 Hun, 469, 8 N. Y. Supp. 908.

Omission to punish medical aid .- An indictment under the New York Pen. Code, § 193, subd. 3, alleging that the "act, procurement or culpable negligence" was the failure of the defendants to supply and provide the deceased with "proper and necessary medicine, medical care and attention" is subject to demurrer as not showing what particular act or omission is relied upon as constituting the crime. People v. Quimby, 113 App. Div. (N. Y.) 793, 99 N. Y. Supp. 330. But an indictment under § 288 of the Pen. Code in this State which charges that the defendant wilfully, maliciously and unlawfully omitted, without lawful excuse, to perform a duty imposed upon him by law, to furnish medical attendance for his minor child, said minor being ill and suffering from catarrhal pnuemonia, and that he wilfully, maliciously and unlawfully neglected and refused to allow said minor to be attended and provided for by a regular licensed and practicing physician, is not bad because it fails to allege that the case was one in which a regular licensed and practicing physician should have been called. People v. Pierson, 176 N. Y. 201, 68 N. E. 243, 63 L. R. A. 187, 98 Am. St. Rep. 666.

Indictment under Elkins Act. (Act. Feb. 19, 1903, c. 708, 32 Stat. 847, U. S. Comp. St. Supp. 1905, c. This act was passed for the purpose of prohibiting rebates, concessions or discriminations against the regular charges for the transportation of property and provided that " every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept or receive any such rebates, concessions, or discrimination shall be deemed guilty of a misdemeanor" and subject to punishment therefor. It is decided that this act was intended, among other things, to cover the cases where rebates are not paid directly to the shipper, and therefore an indictment for this offense is sufficient though it does not allege that the rebate was given to the shipper but charges that it was given to a certain designated person who is alleged to be the authorized agent of the shipper and vested by the shipper with the sole and exclusive power and authority to determine over what lines of common carriers shipments shall be made by the shipper. The court said as to this question: "The mere fact

It must on its face by plain allegations, not by inference merely, charge some act charged by the statute as constituting the of-

that a rebate is not paid to the shipper, but is paid to somebody else is quite immaterial under the Elkins Act. If it is in fact a rebate, concession or discrimination whereby the property is transported at a less rate than that named in the tariff, the unlawful act is committed. If upon the trial of this case it should appear from all the evidence that the payments charged were nothing but a payment to Palmer as a commission for obtaining business for the railroad, they would not be rebates within the meaning of the act. But the indictment alleges that they were." United States v. Delaware, L. & W. R. Co., 152 Fed. 269. Per Holt, J. Again an indictment for violation of this law need not allege that the published rate is a reasonable one nor set out in full the carrier's tariffs. United States v. Standard Oil Co., 148 Fed. 719. The giving or receiving of the rebate or concession is the essence of the offense and the device by which the concession or transportation is brought about is not an essential element of the crime and need not be pleaded in the indictment. Armour Packing Co. v. United States, 153 Fed. 1 (C. C. A.). And an information which described the defendant as the Mutual Transit Company, a " common carrier by water route to the town of West Superior, in the State of Wisconsin," but which did not allege that the Mutual Transit Company, being a water carrier, was "used under a common control, management, or arrangement for a continuous carriage,"

etc., was held sufficient where it set forth facts which showed that the water carrier was used under a common arrangement with the railroads, the other common carriers in the transportation of property. United States v. Camden Iron Works, 150 Fed. 214. But in a recent case in the United States Circuit Court it is held in determining the sufficiency of an indictment under this act, that the clause prohibiting the giving of rebates whereby property in interstate transit "shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier" has reference only to the carrier proceeded against and a demurrer was in this case sustained where it did not appear from the indictment that the carrier filed published the violated tariff. United States v. New York Central & Hudson River Railroad, 157 Fed. 293.

See further as to indictments under this act §§ 382, 391 herein.

Using mail for lottery purposes.—An indictment for sending through the mails newspapers containing an advertisement of a lottery or gift enterprise, framed under U. S. Pen. St., § 3894 (U. S. Comp. St. 1901, p. 2659), should allege the existence of such a device or scheme to bring the offense within the statute. United States v. Irvine, 156 Fed. 376.

Indictment under Sherman Anti-Trust Law (Act July 2, 1890, ch. 647, 26 Stat. 209; U. S. Comp. St. 1901, p. 3200) held to sufficiently

The indictment should, in all cases, employ so many of the substantial words of the statute as will enable the court to see on what statute it is founded, and all other words which are essential to a complete description of the offense or such words which are equivalent, or more than equivalent to those used in the statute, provided they include the full signification of the statutory words, but not otherwise.23 So it is said that no principle of criminal pleading is better settled than that an indictment for a mere statutory offense must be proved upon the statute and that this fact must distinctly appear upon the face of the indictment That it shall so appear the pleader must either charge the offense in the language of the act, or specifically set forth the facts constituting the same.24 And in another case it is said to be a well settled, general principle of criminal law that in an indictment for an offense created by statute, the offense must be described in the words of the statute, and when the words thereof are descriptive of the offense, it is necessary that the defendant should be brought within all the material words of the statute.25

§ 375. Same subject — Illustration of rule.—When the intention with which an act is done is an ingredient of the statutory crime, that intention must be alleged, and a word that conveys the idea of a physical effort to do the act, instead of the intent with which the act was done, is insufficient.<sup>26</sup> And where an information, under a statute making it a criminal offense to "wilfully" disturb any congregation met for religious worship, omitted to charge that the act of the defendants was "wilfully"

charge the combination and conspiracy. See United States v. MacAndrews & Forbes Co., 149 Fed. 823.

22. State v. Meysenburg, 171 Mo. 1, 71 S. W. 229, per Gantt, J., citing State v. Kesslering, 12 Mo. 565; State v. Davis, 70 Mo. 467, 5 Cyclopedia of Law & Procedure, 1042.

23. State v. Williamson, 22 Utah,

248, 62 Pac. 1022, 83 Am. St. Rep. 780; per Minor, J.

24. Johnson v. People, 113 Ill. 99. Per Mulkey, J.

25. State v. Elborn, 27 Md. 488, 488. Per Crain, J.

26. State v. Marshall, 14 Ala. 411. See §§ 326, 327 herein as to charging intent.

done, it was held that it was fatally defective and that the omission was not supplied by the conclusion "contrary to statute."27 So an indictment under the Penal Code in New York for the crime of keeping a room for recording bets and selling pools upon the results of horse races, is defective where it fails to allege that the defendants kept and occupied it with books, papers, apparatus or paraphernalia for the purpose of recording bets or wagers, since the statute makes the presence of the books or apparatus an essential ingredient of the crime.<sup>28</sup> And where by statute it was made an offense for any "person who shall mark or brand any unmarked or unbranded horse . . . not being his own property, and without the consent of the owner" and an indictment was drawn in the language of the statute, it was held that it was properly quashed, for want of an averment of the ownership of the animal, or that the owner was unknown.29 So the omission in an indictment for perjury to charge, in the language of the statute, that the defendant deposed, affirmed, or declared same matter to be fact, knowing the same to be false, or denied some matter to be fact knowing the same to be true, is a substantial defect and is not cured by a statute providing that "no indictment shall be quashed if any indictable offense is clearly charged therein, or if the charge be so explicitly set forth that judgment can be rendered thereon" since no indictable offense is set forth in the indictment

27. State v. Stroud, 99 Iowa, 16, 68 N. W. 450. The court said: "The law says it must be 'wilfully' done It is not the office of the words 'contrary to statute in such cases made and provided' to supply averments of facts in indictments." Per Granger, J

28. People v. Stedeker, 175 N. Y. 57, 45 N. E. 398, decided under New York Pen. Code, § 351.

29. State v. Faucett, 15 Tex. 584. The court said: "The offense charged, though created by statute, is in its nature essentially the same as the crime of larceny; and though all the

ingredients, necessary to constitute that offense, do not enter into the definition of this, and consequently need not be averred and proved in order to authorize a conviction under the statute, yet the ownership of the property does as certainly enter into and constitute an ingredient in this offense as in that of larceny, as in that case, so in this, the property in the animal should be averred in the true answer, if known; and, if not known, it should be stated in the indictment, that it was the property of some persons to the jurors unknown." Per Wheeler, J.

according to statute.<sup>30</sup> And it is declared that no allegation of unlawfulness, nor being against the statute, nor in collusion, will make good the indictment, if it does not bring the acts prohibited or commanded, in the doing or not doing of which the offense consists, within the material words of the statute.<sup>31</sup>

§ 376. Must apprise defendant with reasonable certainty of nature of accusation.—The general rule as to charging a purely statutory offense is subject to the qualification, declared to be fundamental in the law of procedure, that the accused must be apprised by the indictment, with reasonable certainty of the nature of the accusation against him, so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense.<sup>32</sup> When the statute creates the offense and defines it, it is sufficient if the indictment uses the words of the statute, unless the words be indefinite and vague, ambiguous or general, in which case the indictment must so particularize the act complained of that the party charged shall be in no doubt of the offense alleged against him. The certainty required is that which will enable him to plead the verdict in bar of any future action.<sup>33</sup> And in a recent case in the United States Circuit Court of Appeals it is said that "where a crime is a statutory one, the indictment must set forth with clearness and certainty every essential element of which it is composed. It must portray the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet and

30. State v. Morse, 1 G. Greene (Iowa), 503.

**31**. State v. Williamson, 22 Utah, 248, 62 Pac. 1022, 83 Am. St. Rep. 780; per MINOB, J.

32. United States.—United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819.

Arkansas.—Glass v. State, 45 Ark. 173.

Kentucky.—Commonwealth v. Cook, 13 B. Mon. 149.

New Hampshire.—State v. Peirce, 43 N. H. 273.

New York.—People v. Taylor, 3 Den. 91.

Texas.—Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258.

See §§ 250, 251, herein as to charging offense with reasonable certainty.

33. United States v. Crosby, 25 Fed. Cas. No. 14,893, 4 Cranch C. C. 517. Per Bond, J.

to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or an acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction."<sup>34</sup> So it has been declared that in proceeding under a statute of a highly penal character the indictment should be construed strictly and that unless it state expressly every fact necessary to constitute the offense, and with such certainty as to show distinctly what offense has been committed, and what penalty has been incurred, it is bad, and no judgment can be rendered on it against the defendant.<sup>35</sup>

§ 377. Same subject — Sufficient if words used make charge clear — Surplusage.—While an absolute defect will not be cured, or a positive fact supplied by presumption, yet, when the difficulty arises from the inartificial use of language, and it is evident the statute has been complied with, it is held that liberality will be indulged in support of the record.<sup>36</sup> "Courts are especially

34. Armour Packing Co. v. United States, 153 Fed. 1, 16. Per SANBORN, J., citing Ledbetter v. United States, 170 U. S. 606, 609, 610, 18 Sup. Ct. 774, 42 L. Ed. 1162; United States v. Britton, 107 U. S. 655, 669, 670, 2 Sup. Ct. 512, 27 L. Ed. 520; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135; United States v. Hess, 124 U. S. 483, 488, 8 Sup. Ct. 571, 31 L. Ed. 516; United States v. Cook, 17 Wall. (U. S.) 168, 174, 21 L. Ed. 538; United States v. Cruikshank, 92 U.S. 542, 558, 23 L. Ed. 588; United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Miller v. United States, 66 C. C. A. 399, 403, 133 Fed. 337, 341.

35. Commonwealth v. Walters, 6 Dana (Ky.) 290. Per Marshall, J. 36. Nichols v. State, 46 Miss. 284. Sufficiency of indictment for false swearing by president of corporation in making an affidavit, under the laws of the State, wherein the defendant swore that the corporation, the Waters Pierce Oil Company, of which he was president, was not "a party to any agreement . . . or understanding with any other corporation . . . to regulate or fix the price of any article of manufacture . . . and was not then a party to "any agreement . . . to fix or limit the amount of supply or quantity of any article of manufacture." The indictment in this case was held to sufficiently charge the substance of the offense, the court decalled upon to overlook slight technical objections, to disregard popular prejudices, and to so construe statutes and adjudge causes, that the avowed objects of the legislature for the public good may be respected and enforced. To this end, an indictment in substantial compliance with the statute upon which it is framed, should not be deemed insufficient, however defective it may be in mere matters of form, which cannot prejudice the rights of the accused."<sup>37</sup> Therefore an indictment which charges the offense in the language of the statute creating it or so plainly that the nature of the offense may be easily understood by the jury is as a general rule regarded as sufficient.<sup>38</sup> And in New York it is

claring that "Whatever may have been the high degree of certainty required in framing indictments at common law, it is now well settled that refinement and technicality must yield to substantial things. The criterion for judging the sufficiency of indictments is whether the words employed make the charge clear to the 'common understanding.'" Ex parte Pierce, 155 Fed. 663, 665. Per ADAMS, J.

An indictment of a United States senator under § 1782, U. S. Rev. St., for receiving compensation from a corporation in respect to a matter in which the United States is interested informs the accused with reasonable certainty of the nature and cause of the accusation against him where the allegations are sufficient to enable him to prepare his defense, and in the event of an acquittal or conviction to plead the judgment in bar of a second prosecution against him. The court said: "The accused was not entitled to more, nor could be demand that all the special or particular means employed in the commission of the offense should be more fully set

out in the indictment. The words of the indictment directly and without ambiguity disclosed all the elements essential to the commission of the offense charged, and, therefore, within the meaning of the constitution and according to the rules of pleading, the defendant was informed of the nature and cause of the accusation against him." Burton v. United States, 202 U. S. 344, 373, 26 Sup. Ct. 344. Per Mr. Justice Harlan.

Sufficient statement of offense within meaning of extradition laws.—"Let it once be conceded or determined that the substance of an offense is stated in the indictment, however inartificially it may be done, or however involved with immaterial or incompetent matters it may be, all other questions affecting the proceedings or the merits of the case must be relegated to the consideration and final adjudication of the courts of the demanding State." Ex parte Pierce, 155 Fed. 663. Per Adams.

- **37**. Zumhoff v. State, 4 G. Greene (Iowa), 526, 531. Per Greene, J.
  - 38. Robbins v. State, 119 Ga. 570,

decided in a recent case that under the code provision defining homicide as "manslaughter, in the first degree, when committed without a design to effect death, either (1) by a person engaged in committing or attempting to commit, a misdemeanor affecting the person or property, either of the person killed, or of another; or (2) in the heat of passion, but in a cruel or unusual manner, or by means of a dangerous weapon,"39 an indictment which contains no allegations that the crime was committed in the heat of passion or by means of a dangerous weapon or alleges in express terms that the defendant was engaged at the time in committing or attempting to commit a misdemeanor affecting the person who was killed sufficiently charges manslaughter where the facts stated in the indictment show clearly that the defendant was engaged in committing either a felony or misdemeanor upon the person deceased. The court said: "One or the other of these conclusions necessarily follow from the facts stated, and it was unnecessary, therefore, to allege the conclusions in addition to the facts from which the conclusions are Again where an offense is sufficiently described in drawn."40 the words of the statute or by the use of equivalent words the fact that there is unnecessary or redundant matter does not

46 S. E. 834; Thomas v. State, 69 Ga. 747; Warriner v. People, 74 Ill. 346; O'Donnell v. People, 110 Ill. App. 250, affirmed in Gallagher v. People, 211 Ill. 158, 71 N. E. 842; State v. Cobb, 113 Mo. App. 156, 87 S. W. 551.

39. N. Y. Pen. Code, § 189.

40. People v. Stacy (N. Y. App. Div. 1907), 104 N. Y. Supp. 615. The part of the indictment charging the crime which was objected to was as follows: "The said Fred Stacy, at the town of Malone, in the county of Franklin, in the State of New York, on the 29th day of October, 1905, did wrongfully, unlawfully, and feloniously, but without design to kill,

with force and arms, with his fists and feet, assault, strike and kick one Stella Stacy upon her spine, abdomen and side, thereby inflicting serious, grievous, and mortal wounds and injuries upon her, the said Stella Stacy, from the effects of which said wounds and injuries the said Stella Stacy thereafter, on the 14th day of November, 1905, died, whereby the said Fred Stacy did commit the crime of manslaughter in the first degree, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity."

vitiate an indictment or information but such matter may be rejected as surplusage.<sup>41</sup>

§ 378. Offense composed of several elements or multiplicity of acts.—Where an. offense embraces number of a ments it is esseential in an indictment therefor that such elements should be set out as are sufficient to advise the defendant specifically of what he is to meet. 42 So, it is declared that "while it is sufficient, ordinarily, to charge the offense in the language of the statute, yet when the words are not precise and are uncertain in their meaning, or imply a multiplicity of acts that may or may not constitute the offense in whole or in part, it is necessary to charge the facts that give special character or significance to the acts charged to have been done."43 And where a statute creates an offense, composed of different constituents, and the same statute makes each of these constituents a distinct offense, it is necessary in an indictment for the offense first mentioned, that the particular constituent or constituents relied on should be specified with accuracy therein.44

§ 379. Same subject — Rule in New York.—In New York it is provided by code that the indictment must contain (1) the title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties; (2) a plain and concise statement of the act constituting the crime

**41. Arkansas.**—Moose v. State, 49 Ark. 499, 5 S. W. 885.

Illinois.—Snell v. People, 29 Ill. App. 470.

Louisiana.—State v. Desroche, 47 La. Ann. 651, 17 So. 209; State v. Tyler, 46 La. Ann. 1269, 15 So. 624.

New York.—People v. Lawrence, 137 N. Y. 517, 33 N. E. 547, 51 N. Y. St. R. 286, rev'g 66 Hun, 574, 21 N. Y. Supp. 818.

North Carolina.—State v. Flowers, 109 N. C. 841, 13 S. E. 718.

**Texas.**—Johnson v. Waite, 28 Tex. App. 562, 13 S. W. 1005.

**Vermont.**—State v. Switzer, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789.

Wisconsin.—Bernhardt v. State, 82 Wis. 23, 51 N. W. 1009.

**42**. State v. McDowell, 1 Penn. (Del.) 2, 39 Atl. 454.

**43**. State v. Patterson, 6 Kan. 677, 50 Pac. 65.

44. State v. Mills, 14 Tex. 98.

without unnecessary repetition.<sup>45</sup> Under this provision of the code, a statement of facts in an indictment which is merely a repetition of the crime charged, is not sufficient, especially in a case where it may be made out by proof of any of many different acts which constitute a violation of the statute under which the indictment is found and it is impossible for the accused to know what specific violation he is called upon to meet and he cannot therefore properly prepare for his trial. In such a case a demurrer to the indictment upon the ground that it does not contain a plain and concise statement of the acts constituting the crime is properly sustained.<sup>46</sup>

§ 380. Use of common law form in charging offense.—As a general rule where the elements of a crime are the same both at common law and under the State, the indictment may follow either.<sup>47</sup> So where the statute does not employ any terms descriptive of the offense, but merely declares the punishment of an offense, known to the common law, then the mode of framing the indictment will be judged of with regard to the comon law rule.<sup>48</sup> And in a case in New York it has been said that "there would seem to be no reason why the form an indictment, which was considered sufficient under the strict and technical system of pleading formerly prevailing, and which required the allegation of every essential fact constituting the crime, should be deemed insufficient under a system directed to the simplification of criminal proceedings, for the avowed purpose of obviating a

45. N. Y. Code Crim. Proc., § 275.
46. People v. Corbalis, 178 N. Y.
516, 71 N. E. 106, reversing People v.
Corbalis, 86 App. Div. 531, 83 N. Y.
Supp. 782, and citing People v.
Dumar, 106 N. Y. 502, 13 N. E. 325;
People v. Peckens, 153 N. Y. 576, 586,
47 N. E. 883; People v. Willis, 158
N. Y. 392, 396, 53 N. E. 29; People v.
Klipfel, 160 N. Y. 371, 374, 54 N. E.
788; People v. Kane, 161 N. Y. 380,
386, 55 N. E. 946.

**47**. Shotwell v. State, 43 Ark. 345. See State v. Lu Sing (Mont., 1906), 85 Pac. 521.

If a statute adopts a common law offense without otherwise defining the crime, all the common law requirements should be followed, in the indictment. State v. Absence, 4 Port. (Ala.) 397.

48. State v. Stedman, 7 Port. (Ala.) 495.

failure of justice, which had sometimes occurred through the technicalities of an artificial and complex mode of procedure."49 When the statute punishes an offense, by its legal designation. without enumerating the acts which constitute it, then it is necessary to use the terms which technically charge the offense at com-So in the case of an indictment for manslaughter mon law.50 where the statute does not distinguish the crime from that at common law, if it is drawn after an approved common law precedent it will be good.<sup>51</sup> And where the statutory definition of murder does not differ from that at common law, an indictment containing every substantial requisite at common law will be sufficient under the statute.<sup>52</sup> So in New York it has been decided that the specification in the statute of the cases which shall be deemed murder in the first degree,58 does not necessarily require a change in the form of an indictment, and a conviction under a common law indictment, of murder in the first degree, is proper where the offense proved is brought within either of the

49. People v. Conroy, 97 N. Y. 62, 69. Per RUGER, C. J., who further "The form adopted in this case was the old common law form of pleading which has been uniformly approved as sufficient by the courts of this State through all the statutory changes in the definition of the crime of murder, and embraces all the allegations deemed material by the authors of the code. It is undoubtedly the better way of pleading, to charge the crime to have been committed with one of the several intents described in the code, but we are of the opinion that it is sufficient if the description of the offense be in the language employed in the second count of this indictment."

50. Tully v. Commonwealth, 4 Metc. (Mass.) 357.

If the statute uses a common law

name for a crime which it proposes to punish, the indictment must set forth the various ingredients of the crime which go to make up the offense at common law. United States v. Crosby, 25 Fed. Cas. No. 14,893, 4 Cranch C. C. 517.

51. Sutcliffe v. State, 18 Ohio, 469, 51 Am. Dec. 459; see Jennings v. State, 7 Tex. App. 350, holding otherwise where the statutory definition differs in its elements, definition and penalty from the definition of the offense at common law.

52. Gerhrke v. State, 13 Tex. 568; Jennings v. State, 7 Tex. App. 350, citing Perry v. State, 44 Tex. 473; Wall v. State, 18 Tex. 682; White v. State, 16 Tex. 206. See State v. Lu Sing (Mont., 1906), 85 Pac. 521.

53. N. Y. Act of 1876 (Ch. 333, Laws of 1876).

statutory definitions.<sup>54</sup> It was said in this case: "It has been settled by a series of adjudications commencing with the case of People v. Enoch,55 that a specification in the statute of the cases which shall be deemed murder in the first degree and the introduction of new definitions, or divisions, does not necessarily require a change in the form of indictment and that a conviction under a common law indictment of murder in the first degree may be had in any case where the offense proved is brought within either of the statutory definitions.<sup>56</sup> The statute has not made it necessary to change the form of criminal pleading in indictments for murder, and it has been held that a common law indictment was sufficient to sustain a conviction of murder in the second degree under the act of 1862." 57 In a case in Louisiana it is declared that "It seems to be no longer an open question in the jurisprudence of this State, that in an indictment under a statute providing a penalty for the commission of a common law offense, it is insufficient to charge the offense in the statutory terms alone. but all essential averments in an indictment at common law for the same offense will be deemed necessary here." 58 It is, however, held that it is unnecessary to mingle both statutory and common law forms and that when challenged the indictment must be sufficient according to the one or the other standard.59

54. Cox v. People, 80 N. Y. 500.

55. 13 Wend. (N. Y.) 159.

56. People v. White, 22 Wend. (N. Y.) 176, 24 Wend. (N. Y.) 520; People v. Fitzgerald, 37 N. Y. 413; People v. Kennedy, 39 N. Y. 245.

Per Andrews, J., citing People v. Keefe, 40 N. Y. 348; People v. Thompson, 41 N. Y. 1.

The New York Code of Criminal Procedure (§ 273), was not intended to abolish existing forms of pleading in criminal actions, or to obliterate forms of expression, or the judicial construction theretofore given to the language employed in such

pleading; but its true office was to abrogate the technical rules formerly governing the construction of criminal pleadings, and to substitute therefor the simplicity and liberality of interpretation presented by the new system of criminal procedure. People v. Conroy, 97 N. Y. 62, 69. Per Ruger, C. J.

58. State v. Flint, 33 La. Ann. 1288. Per Fenner, J., citing State v. Thomas, 29 La. Ann. 601; State v. Curtis, 30 La. Ann. 814; State v. Cook, 20 La. Ann. 145; State v. Durbin, 20 La. Ann. 408.

59. Nichols v. State, 46 Miss. 284.

§ 381. Use of words equivalent to those of statute.—Although there are some cases which hold that in charging a statutory offense it is essential that the words of the statute should be used, 60 yet it is not generally considered necessary that the exact words of the statute should be employed unless the words are technical words which constitute the specific offense; 61 and it is a general rule that an indictment is sufficient in which the offense is charged in words equivalent to those used in the statute creating or defining it. 62 So an indictment will be sufficient though it

60. La Vaul v. State, 40 Ala. 44; State v. Stedman, 7 Port. (Ala.) 495; State v. Cheatwood, 2 Hill (S. C.) 459.

61. Drummond v. Republic, 2 Tex. 156. See Schley v. State (Fla., 1904), 37 So. 518.

**62. Alabama.**—Giles v. State, 88 Ala. 230, 7 So. 271.

**Arkansas.**—Cannon v. State, 60 Ark. 564, 31 S. W. 150.

Indiana.—Nichols v. State, 127 Ind. 406, 26 N. E. 839; Dolan v. State, 122 Ind. 141, 23 N. E. 761; Franklin v. State, 108 Ind. 47, 8 N. E. 695.

**Kentucky.**—Flint v. Commonwealth (Ky.), 23 S. W. 346; Johnson v. Commonwealth, 94 Ky. 341, 22 S. W. 335.

Louisiana.—State v. Pellerin, 118 La. 547, 43 So. 159; State v. Washington, 41 La. Ann. 778, 6 So. 633; State v. Brown, 41 La. Ann. 345, 6 So. 541.

Massachusetts.—Commonwealth v. Dill, 159 Mass. 61, 34 N. E. 84.

Mississippi.—Richberger v. State (Miss. 1907), 44 So. 772. See Woods v. State, 67 Miss. 575, 7 So. 495.

Missouri.—State v. Brown, 115 Mo. 409, 22 S. W. 367; State v. Terry, 106 Mo. 209, 17 S. W. 288; State v. Mohr, 55 Mo. App. 329; State v. Matheis, 44 Mo. App. 294; State v. Barr, 30 Mo. App. 498; State v. Delay, 30 Mo. App. 357; State v. Lawson, 30 Mo. App. 139.

Montana.—State v. Green, 15 Mont. 424, 39 Pac. 322.

Nebraska.—Smith v. State, 72 Neb. 345, 100 N. W. 806; Hodgkins v. State, 36 Neb. 160, 54 N. W. 86.

New York.—People v. Lowndes, 130 N. Y. 455, 29 N. E. 751, 42 N. Y. St. R. 360; Tully v. People, 67 N. Y. 15; People v. Helmer, 13 App. Div. 426, 43 N. Y. Supp. 642; People v. Cleary, 13 Misc. R. 546, 35 N. Y. St. R. 588; People v. Enoch, 13 Wend. 159.

North Carolina.—State v. Varner, 115 N. C. 744, 20 S. E. 518; State v. Stubbs, 108 N. C. 774, 13 S. E. 90.

**Pennsylvania.**—Commonwealth v. Stewart, 2 Pa. Dist. R. 43, 12 Pa. Co. Ct. R. 151.

South Carolina.—Butler v. State, 3 McC. L. 383; State v. Vill, 2 Brev. 262.

Tennessee.—State v. Smith (Tenn. 1907), 105 S. W. 68.

Wisconsin.—State v. Mueller, 85 Wis. 203, 55 N. W. 165, decided under Wis. Rev. Stat., § 4669.

It is a general rule that an in-

contains words which have a more extensive signification than those used in the statute, where the latter words are necessarily included in the former. 63 So in an early case in New York it is said, "Where an offense is created by statute, which was not an offense by the common law, it is a general rule that the indictment must charge the offense to have been committed under the circumstances and with the intent mentioned in the statute, which of course contains the only appropriate definition of the crime. But even in that case it is not necessary to pursue the exact words of the statute creating the offense, providing other words are used in the indictment which are equivalent, or words of more extensive signification, and which necessarily include the words used in the statute." 64 And in a later case in New York this doctrine is affirmed in the following words: "It is a well settled rule of criminal pleading that an indictment upon a statute must state all the facts and circumstances which constitute the statutory offense, but it is not necessary that the words of the statute should be precisely followed. Words of equivalent import

dictment or information will be sufficient to withstand a motion to quash, if it charge the offense in the language of the statute or in terms substantially equivalent thereto. Benham v. State, 116 Ind. 158, 18 N. E. 454, per Howk, J., citing Howard v. State, 87 Ind. 68; State v. Miller, 98 Ind. 70; Ritter v. State, 111 Ind. 324.

It is not essential in an indictment for a statutory offense to employ the precise words of the statute. It is sufficient to state all the facts constituting the offense, so as to bring the accused precisely within the statutory provisions. Eckhardt v. People, 83 N. Y. 462. See People v. Klock, 48 Hun (N. Y.) 275, 16 N. Y. St. Rep. 565.

63. Louisiana.—State v. Brown, 41 La. Ann. 345, 6 So. 541. **Maine.**—State v. Lynch, 88 Me. 195, 33 Atl. 978.

New York.—Tully v. People, 67 N. Y. 15, citing People v. Enoch, 13 Wend. 159, 172, 27 Am. Dec. 197.

Texas.—State v. Wupperman, 13 Tex. 33.

**Utah.**—State v. Williamson, 22 Utah, 248, 62 Pac. 1022, 83 Am. St. Rep. 780.

"It is well settled that wherever there is a change made of phraseology and a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient." State v. Brown, 41 La. Ann. 345, 6 So. 54.

People v. Enoch, 13 Wend. (N. Y.) 159, 33 Atl. 978.

may be substituted, or words of more extensive signification, and which necessarily include the words in the statute. The decisions are by no means uniform on the subject, and elsewhere great particularity has been required in framing indictments upon statutes, and in some cases it has been held that the precise language of the statute must be used. But the rule in this State is in conformity with the more liberal doctrine above stated." 65 this connection it is said that to state the offense in the words of the statute, is the simplest, safest and most correct mode of drafting an indictment, and that, while it is true, equivalent words may be used in lieu of the statutory description of the offense, yet it is dangerous as tending not only to material inaccuracy in substance, but also to irregularity in matters of form. But if the words of the statute are not employed, other words clearly equivalent must be used, so as to bring the offense charged within the provision and limitations of the statute defining or creating it.66

§ 382. Where statute is in disjunctive—Use of conjunctive.—Where a statute enumerates several acts disjunctively, which together or separately shall constitute the offense, an indictment thereunder, if it charges more than one of them, which it may do even in the same count, should do so in the counjunctive, and if the disjunctive is used, the indictment will be bad for uncertainty.<sup>67</sup> So it has been said that it is permissible where the

65. Tully v. People, 67 N. Y. 15, 20. Per Andrews, J., citing People v. Enoch, 13 Wend. (N. Y.) 172; People v. Holbrook, 13 Johns. R. (N. Y.) 90; People v. Rynders, 12 Wend. (N. Y.) 427; Fraser v. People, 54 Barb. (N. Y.) 306; People v. Thompson, 3 Park Cr. (N. Y.) 208.

State v. Riffe, 10 W. Va. 794;
 See State v. Watson, 41 La. Ann. 598,
 So. 125.

67. Arkansas.—Thompson v. State, 37 Ark. 408.

California.—People v. Tomlinson, 35 Cal. 503.

Indian Territory.—Stancheliss v. United States (Ind. Ter., 1904), 82 S. W. 882.

Iowa.—State v. Beebe, 115 Iowa, 128, 88 N. W. 358.

Kansas.—State v. Seeger, 65 Kan. 711, 70 Pac. 579.

Missouri.—State v. Pittman, 76 Mo. 56; State v. McCollum, 44 Mo. 343; State v. Fitzsimmons, 30 Mo. 236; State v. Freeze, 30 Mo. App. statute may be violated in one of several ways, to charge or allege conjunctively that the party violated the statute by all the means set forth in the law; but it is not permissible, under any circumstances, to charge it in the alternative. The allegations must be distinct and affirmative, and not uncertain nor in the alternative. This general rule has been applied to an indictment under a statute making it an offense to sell or give away alcoholic liquors, 69 to "utter, publish, pass or attempt to pass" a forged

347; State v. Fairgrove, 29 Mo. App. 641.

New Hampshire.—State v. Naramore, 58 N. H. 273.

New Jersey.—State v. Drake, 30 N. J. L. 422; State v. Price, 11 N. J. L. 203.

New York.—People v. Kane, 61 N. Y. Supp. 632, 14 N. Y. Cr. R. 316. See Bork v. People, 91 N. Y. 5.

North Carolina.—See State v. Van Doran, 109 N. C. 864, 14 S. E. 32; State v. Harper, 64 N. C. 129.

Oregon.—State v. Carr, 6 Oreg. 133.

Rhode Island.—State v. Colwell, 3 R. I. 284.

Texas.—Copping v. State, 7 Tex. App. 61.

Wisconsin.—Clifford v. State, 29 Wis. 327.

Such an indictment is sufficient.—United States v. Delaware, L. & W. R. Co., 152 Fed. 269; Stockslager v. United States, 110 Fed. 590, and not bad for duplicity. State v. Pittman, 76 Mo. 56.

Indictment under Elkins Act. (Act Feb. 19, 1903, c. 708, 32 St. 847, U. S. Comp. Stat. Supp., 1905, c. 509.)—Where it is claimed by demurrer that an indictment under this

act containing several counts is bad for duplicity, the objection being based on the fact that the Elkins Act provided that it is unlawful for any corporation to offer, grant, or give a rebate and that each count of the indictment alleged that the railroad company offered, granted and gave a rebate, and that as under the statute offering to give a rebate is a crime, and the actual giving of a rebate is a crime, two crimes are charged in each count of the indictment, the indictment is bad, it is held that the indictment charges but one offense and is good. The court "In a criminal pleading if a statute makes each one of various acts criminal, and the indictment sets forth said acts coupled with the conjunctive 'and' instead of the disjunctive 'or,' if such acts are shown to be merely different stages of the same transaction, the indictment is good." United States v. Delaware, L. & W. R. Co., 152 Fed. 269. HOLT, J.

See further as to indictments under this act §§ 374, 391 herein.

**68.** Venturio v. State, 37 Tex. Cr. 653, 40 S. W. 974.

69. Thompson v. State, 37 Ark. 408.

## § 383 Charging the Offense-Statutory Offenses.

instrument with intent to defraud, 70 for a debtor to fraudulently conceal property "to prevent the attachment or seizure of the same upon mesne process or execution." 71 for "each and every person who shall deal, play, or carry on any game of faro," 72 and to disturb a congregation assembled for religious worship "by loud or vociferous talking or swearing or by any other noise." 78 And under a statute providing that when it is necessary to state the ownership of property "it shall be sufficient to name one of such persons, and state such property to belong to the person so named, and another, or others, as the case may be," an indictment for larceny is fatally defective which charges the property taken as the property of a specified person "and another or In those cases, however, where the words are synonyothers." 74 mous, the use of the disjunctive or is held permissible.75 So it has been decided in the case of an information for the larceny of cattle that the use of the disjunctive "or" in the clause "did then and there feloniously take, steal, drive or lead away" did not render the pleading bad because the association of the word "feloniously" with the words "steal, take and carry, lead or drive away" in the statute made each of the phrases synomymous with the others. 76

§ 383. Recital of statute on which indictment based not necessary.—It is not essential to the validity of an indictment that it should specify the particular act upon which it is founded,<sup>77</sup> provided it adequately describes the offense set forth

70. People v. Tomlinson, 35 Cal. -

**71**. State v. Naramore, 58 N. H. 273.

72. State v. Carr, 6 Oreg. 133.

73. Copping v. State, 7 Tex. App. 61.

74. State v. Harper, 64 N. C. 129.

75. People v. Tomlinson, 35 Cal. 503; Clifford v. State, 29 Wis. 327. See State v. Moore, 61 Mo. 276; State v. Ellis, 4 Mo. 474.

**76**. State v. Brookhouse, 10 Wash. 87, 38 Pac. 862.

**77. California.**—Re Mansfield, 106 Cal. 400, 39 Pac. 775.

**Georgia.**—Crabb v. State, 88 Ga. 590, 15 S. E. 457.

Iowa.—State v. Allen, 32 Iowa, 248.

Kentucky.—Powers v. Commonwealth, 90 Ky. 167, 13 S. W. 450.

Maryland.—Rawlings v. State, 2 Md. 201.

in the statute.<sup>78</sup> So in an early case in South Carolina it is said: "Now it has been perfectly settled that there is no necessity in an indictment or information on any public statute, whether the offense be evil in its own nature, or only becomes so by the prohibition of the legislature, to recite the statute upon which it is founded, for the judges are bound, ex vi termini, to take notice of all public acts." So it is said in one case that "we have never understood the law to require an indictment for an offense created by statute to state specifically, by particular reference thereto, the statute violated by the acts alleged to be a crime. The counsel making the objection has cited us to no authority in support of his views; we do not think they are sustained by either authority or sound reason." <sup>80</sup>

§ 384. Effect of misrecitals as to statute.—The fact that there is a clerical mistake in reciting the date of the passage of the statute upon which an indictment for misdemeanor is founded will not be a ground for arresting the judgment after conviction, where the offense is otherwise sufficiently described, the recital of the act being unnecessary.<sup>81</sup> And it has been decided that the

New Jersey.—Mayer v. State, 64 N. J. L. 323, 45 Atl. 624.

North Carolina.—State v. Wallace, 94 N. C. 827.

South Carolina.—Butler v. State, 3 McC. L. (S. C.) 383.

**78**. Re Mansfield, 106 Cal. 400, 39 Pac. 775; State v. Flanagan, 25 R. I. 369, 55 A. 876.

79. Butler v. State, 3 McC. L. (S. C.) 383. Per Colcock, J.

The statute upon which an indictment is founded may be a public statute though it is found in and is a section of a private statute. State v. Wallace, 94 N. C. 827.

80. State v. Allen, 32 Iowa, 248. Per Beck, J.

81. Harris v. State, 3 Lea (Tenn.), 324. The court said: "When the offense is correctly set forth according to the statute, and the statute itself otherwise identified, a variance between the date of the act as charged and its real date, may well be considered as technical." Per COOPER, J.

It is not a valid objection to an indictment that it recites the wrong year in which the statute, under which the defendant was indicted, was passed by the legislature. People v. Reed 47 Barb. (N. Y.) 235. The court said in this case: "It is wholly immaterial when the statute was enacted by the legislature and became a law, provided it was in force when the offense charged in the in-

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particular section of the code upon which the indictment is based need not be stated.82 And an immaterial defect in reciting the title of a statute will not vitiate the indictment.83 A reference in an indictment to the statutes by a particular section must be understood as referring to the section then in force.84 though it is not necessary to set out the particular statute upon which an indictment is founded, yet if the allegations in an indictment as to the statute make it evident that the finding of the grand jury was upon a law which has been repealed, a judgment rendered thereon will be arrested.85 And where it does not appear from the statement of facts that any offense whatever has been committed and the only description is by reference to a statute, the year of which is given wrongly, conviction will not be supported, and it is held that the objection may be taken on appeal.86 And a misrecital of the title of a public statute, so as to make it senseless, in an indictment charging an act to have been done in violation thereof, and not otherwise showing that the act was illegal, is a fatal defect.87 And it has also been de-

dictment was committed. It is a public statute, of the provisions of which courts will take judicial notice, and none of which need have been recited in the indictment. But the statement of the time when it was passed, was altogether surplusage, and wholly immaterial, and could by no possibility have prejudiced the defendant. Consequently the indictment is not rendered invalid by the misstatement of the time of the enactment." Per Johnson, J.

82. Crabb v. State, 88 Ga. 590, 15 S. E. 457, wherein it was said: "It has never been contended, as far as we are aware, since the adoption of the code, that an indictment should specify a particular section thereof, and there would certainly be as much reason for requiring this to be done

as that it should designate a particular act of the legislature."

83. People v. Walbridge, 6 Cow. (N. Y.) 512, so holding where in an indictment under "an act to prevent abuses in the practice of the law, and to regulate costs in certain cases" there was an omission, in reciting the title, of the word "the" after the words "practice of."

84. Oshe v. State, 37 Ohio St. 494. citing Brigel v. Starbuck, 14 Ohio St. 285.

85. United States v. Goodwin, 20 Fed. 237.

86. Commonwealth v. Washburn, 128 Mass. 421, so holding in the case of a complaint.

87. Commonwealth v. A Manwhose Name is Unknown, 6 Gray (Mass.) 489.

cided that if a party undertakes to recite a statute and mistakes a material point, it is incurable, but if he recites truly so much as will serve to maintain his action, and mistakes the rest, this will not vitiate.<sup>88</sup>

§ 385. Misrecitals of statute—Effect of—Conclusion.—Where there is a misrecital of a public act which need not be set out, and the indictment would be good without it, if the indictment conclude "contrary to the form of the act in such case made and provided," the recital may be rejected as surplusage, though it is held otherwise if the act be referred to in the conclusion as the "said statute." So in a case in New Jersey it is said that there is no necessity to recite any public statute on which an indictment is founded, but that when it is recited with a material variance, and the indictment concludes with the words "contrary to the form of the statute in such case made and provided," without referring to the recited statute, the recital may be rejected as surplusage. 90

§ 386. Private statutes—Recitals as to.—In respect to a private statute it is said that the existence of such a law is a fact which must be found or admitted of record to give the court information of its contents, and it must be so stated in pleading so as to enable the court to put it in issue by nul tiel record, if the issue to the court be preferred to one to the jury. In this con-

88. Rawlings v. State, 2 Md. 201. 89. Rawlings v. State, 2 Md. 201.

It is sufficient to charge that the criminal act was "contrary to the laws of said State, the good order, peace and dignity thereof." Crabb v. State, 88 Ga. 590, 15 S. E. 457; or "contrary to the form of the statute," State v. Allen, 32 Iowa, 248; Zumhoff v. State, 4 G. Greene (Iowa), 526; Commonwealth v. Hoye, 11 Gray (Mass.), 462; People v. Stockham, 1 Park. Cr. R. (N. Y.) 424;

Butler v. State, 3 McC. L. (S. C.) 383.

90. Mayer v. State, 64 N. J. L.323, 45 Atl. 624, citing State v.Deney, 55 Vt. 550.

91. State v. Cobb, 18 N. C. 115.

That an act is limited in its operation to a particular county does not make it a private act where it has generally, if not always, been enforced as a public law without regard to the forms requisite in pleading a private nection it is held that in the case of a private statute it is sufficient for an indictment thereunder to set the same forth by chapter and date, with its material provisions incorporated therein. A statute, however, which, though local in its nature, extends to all persons who might come within the territory described, is a public statute of which the courts are required to take judicial notice without being pleaded and an indictment charging a violation thereof is sufficient, which refers to it by its general tenor and further describes it by the date of its approval. 93

§ 387. Indictment not sufficient under statute pleader had in view but good under another statute.—Though an indictment may contain certain matters showing that the pleader had in view one statute under which the indictment is of no force, yet it may be good under another statute. A so it was said by the United States Supreme Court in a case in which this question arose in construing indictments covering an offense under one statute but drawn by the district-attorney under other statutes: "It is said that these indictments were not returned under that statute, and that the indorsement on the margin of each indictment shows that the district-attorney of the United States proceeded under other statutes that did not cover the case of extortion committed by a Chinese inspector under color of his office. It is wholly immaterial what statute was in the mind of the district-attorney when he drew the indictment, if the charges made are

statute. Rawlings v. State, 2 Md. 201.

92. State v. Heaton, 77 N. C. 505. Sufficiency of description.—In a case in Alabama it is held that an indictment for the violation of a special statute may describe it as "an act of the legislature of Alabama" although the technical designation of the legislative body is the "General Assembly." Block v. State, 66 Ala. 493.

93. Carson v. State, 69 Ala. 235.

94. Hodgman v. People, 4 Den. (N. Y.) 235, cited and followed in People v. Townsey, 5 Den. (N. Y.) 70.

See also Commonwealth v. Carter, 14 Ky. Law Rep. 301, holding that where an indictment is good under one statute the fact that the State elects to prosecute the accused under another statute under which the indictment is not good is no ground for sustaining a demurrer to the indictment.

embraced by some statute in force. The indorsement on the margin of the indictment constitutes no part of the indictment and does not add to or weaken the legal force of its averments. We must look to the indictment itself, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different The language of the court in this case is in part statute." 95 quoted in a late case in the United States Circuit Court of Appeals and the doctrine is applied to the case of an indictment of a bankrupt for false swearing before a special commissioner, and it is held that where a bankrupt is sufficiently charged by an indictment with having knowingly and fraudulently made a false oath in a bankruptcy proceeding, and is tried upon the assumption that the indictment was founded on section 5392 of the United States Revised Statutes, and convicted, it is not error to refuse to dismiss the indictment on the ground that the crime charged therein did not come within that section but within section 29 of the bankruptcy act. 96 So the fact that an indictment may be drawn under a section of the statute which is unconstitutional does not vitiate it provided it can be sustained under some other section of the same statute, it being declared that it makes no difference under what particular section of the statute the indictment may be drawn nor the infirmities of such section, provided it be good under some other section of the statute, which is valid.97

§ 388. Where several amendments to statute.—The fact that there are several amendments to a statute and that an indictment fails to allege under which act the defendant is charged will

95. Williams v. United States, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509.

96. Weehsler v. United States, — Fed. —, 16 Am. B. R. 1 (U. S. C. C. A., 1907). In this case the indorsement on the margin of the indictment

showed that the United States district attorney proceeded under section 5392, while the offense charged was one within the special provisions of section 29 of the Bankrupt Act.

97. State v. Vandenburg, 159 Mo. 230, 60 S. W. 79.

not vitiate the indictment where the offense charged is alike indictable under all the acts and the amendments only relate to penalties and proceedings.<sup>98</sup>

§ 389. Rule as to charging statutory misdemeanors.—An indictment charging a statutory misdemeanor substantially in the language of the statute is generally sufficient, 99 and it is said to be rarely necessary to do otherwise. 1 But the rule as to charging misdemeanors in the language of the statute is subject to many exceptions, and does not dispense with the necessity of alleging those facts and circumstances which must necessarily exist in order to bring the act within the purview of the statute, it being said that it will hardly be pretended that an act is within a statute, unless it be within its obvious scope and its true intent and meaning. 2 So in a recent case it is said that "The rule that an indictment for a statutory misdemeanor is sufficient, if the language of the statute is used in charging the offense, is limited to cases where such words fully set forth all the assignments

98. State v. Reyelts, 74 Iowa, 499, 38 N. W. 377.

99. State v. Snyder, 41 Ark. 226, citing State v. Witt, 39 Ark. 216. See also State v. Moser, 33 Ark. 140; State v. Shaw, 22 Oreg. 287, 29 Pac. 1028.

Indictments charging misdemeanor are as a general rule sufficient if drawn in the language of the statute. United States v. Irvine, 156 Fed. 376.

An indictment which charges a statutory misdemeanor in the general language of the statute and is sufficient to apprise the defendant of the nature of the accusation against him, so as to enable him to prepare his defense and plead the judgment, in bar of another indictment for the same offense is sufficient. Glass v. State, 45 Ark. 173.

In a case in New York it is decided in this connection that an indictment for a statutory misdemeanor, which charges the facts constituting the crime in the words of the statute, and contains averments as to the time, place, person and other circumstances to identify the particular transaction is good. People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452.

Though a statute does not declare an offense to be a misdemeanor an indictment may allege it to be. Hall v. State, 3 Ga. 18.

1. Standliff v. United States (Ind. Ter., 1904), 82 S. W. 882.

2. People v. Wilber, 4 Park. Cr. R. (N. Y.) 19. Per Brown, J.

necessary to constitute the offense intended to be punished, without uncertainty or ambiguity." 3

3. United States v. Baltimore & O. R. Co., 153 Fed. 997. Per Goff, J., citing Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830, wherein it is said that "Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former conviction or acquittal, record may show with accuracy the exact offense to which the plea relates." Per Mr. Justice Brown. As prosecutions under the act under which this indictment was framed are frequent at the present time, it has been deemed advisable to insert the two following forms here used as a guide to prevent the repetition of the error occurring therein. Indictment No. 794 reads as follows:

"United States of America, Northern District of West Virginia, ss.:

In the District Court of the United States for the Northern District of West Virginia, at the April term thereof, 1906, at Clarksburg, 'The grand jurors of the United States, impaneled, sworn and charged at the term aforesaid on their oaths aforesaid present: That on the — day of ———, 1905, the Baltimore & Ohio Railroad Company was and still is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, and was then and there duly author-

ized to and was doing business under and by virtue of the laws of the State of West Virginia in the said district, and that the said railroad company was then and there engaged in the operation of a railroad commonly known as the West Virginia & Pittsextending Railroad. Clarksburg, in Harrison county, to Buckhannon, in Upshur county, and that the said railroad was then and there wholly situate and being in the district aforesaid, and that in the operation of the same the said railroad company was then and there engaged in and was carrying and transporting over, upon and by means thereof interstate commerce, the said railroad company was then and there a common carrier, and as such common carrier was then and there engaged in the carrying and transportation of interstate commerce and other freights from points along the line of the said railroad and its branches within the said district to points and places within and without the State of West Virginia; and on the day and year last aforesaid there was situate on or near the line of the said railroad the mines and works of the Red Rock Fuel Company, which said company was then and there the owner of about four thousand acres of land along and adjacent to the said railroad, which said land was then and there underlain with valuable coal of merchantable quality and quantity which said coal then and there was existing under favorable profitable mining conditions, and the

# § 390. Exceptions in statute—General rule.—The general rule as to negativing an exception in charging a statutory offense

said fuel company had then and there and theretofore already opened its mines upon the said coal lands and erected its mining plant and equipped the same for the mining of coal near to and adjacent to the said railroad, and was then and there ready, able and willing to mine and produce, and to continue to mine and produce, the coal from the said mine in great quantities to be carried and transported to various markets outside of the State of West Virginia by means of the said railroad, and had then and there already produced mined great quantities of coal, to wit, at least seven hundred and fifty tons, and the same was then and there ready to be so carried and transported as aforesaid, and the said fuel company was then and there justly and of right entitled to have sidings, switches, turn-outs and connections to and with the said railroad company so to enable it, the fuel company, to have the coal then and there produced and mined, and to be produced and mined, by it, carried and transported by the said railroad company to the markets outside of the State of West Virginia, and the said sidings, switches, turn-outs and connections were then and there necessary to enable it to have said coal so carried and transported; and the said fuel company then and there had made due and proper application and request for the said switches, sidings, turn-outs and connections to the said railroad company. And the said Baltimore & Ohio Railroad Company being then and there engaged in the

operation of the said railroad, and being then and there such common carrier engaged in the carrying and transportation of said interstate commerce by means of and upon and over the said railroad, did then and there knowingly and unlawfully practice an unreasonable and unjust discrimination in respect of the transportation of property in interstate commerce over, upon and by means of said railroad, by failing and refusing to grant and give and furnish the said Red Rock Fuel Company the said switches, sidings, turn-outs and connections, to the undue and unreasonable prejudice and disadvantage of the Red Rock Fuel Company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

'Second Count: And the grand jurors aforesaid, upon their oaths aforesaid, do further present on another day, to wit, on the - day of ---, in the year 1905, the Baltimore & Ohio Railroad Company was and still is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, and was then and there duly authorized to and was doing business under and by virtue of the laws of the State of West Virginia in the said district, and that the said railroad company was then and there engaged in the operation of a railroad commonly known as the Parkersburg Branch Railroad, extending from Clarksburg, in Harrison county, to Buckhannon, in Upshur county, is that where the subject of any exception is found in the enacting or prohibitory clause, it must be excluded by averment in the

and that the said railroad was then and there wholly situate and being in the district aforesaid, and that in the operation of the same the said railroad company was then and there engaged in and was carrying and transporting over, upon and by means of interstate commerce, and the said railroad company was then and there a common carrier, and as such common carrier was then and there engaged in the carrying and transportation of interstate commerce from points along the line of the said railroad within the said district to points and places without the State of West Virginia; and on the day and year last aforesaid there was situate on or near the line of the said railroad the mines and works of the Red Rock Fuel Company, which said company was then and there the owner of about four thousand acres of land along and adjacent to the said railroad, which said land was then and there underlain with valuable coal of merchantable quality and quantity, which said coal then and there was existing under favorable and profitable mining conditions, and the said fuel company had then and there theretofore already opened its mines upon the said coal land and constructed its mining plant equipped the same for the mining of coal near to and adjacent to said railroad and was then and there ready, able and willing to mine and produce. and to continue to mine and produce the coal from the said mine and said land in great quantities to be carried

and transported to various markets outside of the State of West Virginia by means of the said railroad, and had then and there already produced and mined great quantities of coal, to wit, at least seven hundred and fifty tons, and the same was then and there ready to be carried and transported as aforesaid, and the said fuel company was then and there justly and of right entitled to have sidings, switches, turn-outs and connections to and with the said railroad company, to enable it, the fuel company, to have the coal then and there produced and mined, and to be produced and mined, carried and transported by the said railroad company to the markets outside of the State of West Virginia, and that the said sidings, switches, turn-outs and connections then and there necessary to enable it to have the said coal so carried and transported; and the said fuel company then and there had made due and proper application and request for the said switches, sidings, turnouts and connections to the said railroad company. There was then and there situated the works and mines of various and divers other persons, firms and corporations on and along the line of railroads in the said district operated by said various persons, firms and corporations, to wit, the works and mines of the Southern Coal & Transportation Company, the Century Coal Mining Company, and the Fairmount Coal Company, and others to the grand jurors unknown, with the same and like conditions and

pleading, but if it is found in a separate substantive clause or in

circumstances then and there and theretofore as existed and surrounded the Red Rock Fuel Company then and there, and which last-named companies, firms and corporations have theretofore been given, granted and furnished switches, sidings, turn-outs and connections with the said railroads whereon each was situate to enable each of them, respectively, to have the coal so mined and produced by each of them carried and transported by the said railroad company over and upon and by means of the railroads so operated by it to markets outside of the State of West Vir-And the said Baltimore & ginia. Ohio Railroad Company being then and there engaged in the operation of the said railroad, and being then and there such common carrier engaged in the carrying and transportation of the said interstate commerce by means of and upon and over the said railroad, then and there knowingly and unlawfully did practice, give and grant an undue and unreasonable preference and advantage in respect to sidings, switches, turn-outs and connections on its said railroad by giving, granting and furnishing to the said Fairmount Coal Company, the Southern Coal and Transportation Company, and the Century Coal Mining Company sidings, switches, turn-outs and connections then and there and theretofore and by refusing and failing under said same conditions and circumstances then and there existing to give, grant and furnish to the said Red Rock Fuel Company sidings, switches, turn-outs and

connections to and with the said West Virginia & Pittsburg Railroad, which the said fuel company was then and there justly and of right entitled to, to the undue and unreasonable prejudice and disadvantage of the said Red Rock Fuel Company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

Indictment No. 795 reads as follows:

"United States of America, Northern District of West Virginia, ss.:

"In the District Court of the United States in and for the Northern District of West Virginia, at the April term thereof, A. D. 1906, at Clarksburg.

"The grand jurors of the United States impaneled, sworn and charged at the term aforesaid of the court aforesaid on their oaths present: That on the - day of -, 1905, the Baltimore & Ohio Railroad Company was and still is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, and was then and there duly authorized to and was doing business under and by virtue of the laws of the State of West Virginia in the said district, and that the said railroad company was then and there engaged in the operation of a railroad commonly known as the Parkersburg Branch Railroad, extending from Grafton, in Taylor county, through the counties of Taylor, Harrison, Doddridge, Ritchie, and Wood, to the city of Parkersburg, in the

a subsequent statute, and is not an essential part of the descrip-

county of Wood, and that the said railroad with its branches was then and there wholly situate and being in the district aforesaid, and that in the operation of the same the said railroad company was then and there engaged in and was carrying and transporting over, upon and by means thereof interstate commerce; and the said railroad company was then and there a common carrier, and as such common carrier was then and there engaged in the carrying and transportation of interstate commerce and other freights from points along the line of the said railroad and its branches to points and places within and without the State of West Virginia; and on the day and year last aforesaid there was situate along the line of the said railroad and its branches and adjacent thereto the Pitts Vein Coal Company, the New York Mine Company, the Rosemount Coal Company, and the Fairmount Coal Company, and various divers other persons, firms and corporations to the grand jurors unknown, each respectively engaged as shippers, and in furnishing for shipment, carrying and transportation interstate commerce and other freights over, upon and by means of the said railroad from points on the said railroad and its branches to points and places within and without the State of West Virginia. And the said Baltimore & Ohio Railroad Company being then and there engaged in the operation of the said railroad, and being then and there such common carrier engaged in the carrying

interstate and transportation of commerce and other freights by means of and upon and over the said railroad, did then and there knowingly and unlawfully grant and give and practice an unreasonable and unjust discrimination in respect of transportation of property in interstate commerce over, upon and by means of the said railroad, by failing and refusing to grant, give and furnish to the Pitts Vein Coal Company its proper and rightful share and quota of cars and motive power which it was justly and of right entitled to receive from the said railroad company for the carrying and transportation of property in interstate commerce then and there proposed and intended by the Pitts Vein Company to be shipped over, upon and by means of said railroad from points on the said railroad to points and places within and without the State of West Virginia, and by giving, granting and furnishing to the said New York Mine Company, said Rosemount Coal Company, and said Fairmount Coal Company, and to the other said firms, persons and corporations situate and being as aforesaid and to the grand jurors unknown, more than each of their respective proper and rightful share and quota of cars and motive power, and more than each were respectively and of right justly entitled to receive from the said railroad company as shippers, for the carrying and transportation of property in interstate commerce and other freights over and upon and by means of the said railtion of the offense it is a matter of defence and need not be nega-

road from points on the said railroad and its branches to points and places within and without the State of West Virginia, to the undue and unreasonable prejudice and disadvantage of the Pitts Vein Coal Company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

"Second Count: And the grand jurors aforesaid, upon their oaths aforesaid, do further present that on another day, to wit, on the - day of ----, in the year 1905, the Baltimore & Ohio Railroad Company was and still is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, and was then and there duly authorized to and was doing business under and by virtue of the laws of the State of West Virginia in the said district, and that the said railroad company was then and there engaged in the operation of a railroad commonly known as the Parkersburg Railroad, extending Branch Grafton in Taylor county, through the counties of Taylor, Harrison, Doddridge, Ritchie, and Wood, to the city of Parkersburg, in the county of Wood, and that the said railroad with all its branches was then and there wholly situate and being in the district aforesaid, and that in the operation of the same the said railroad company was then and there engaged and was carrying and transporting over, upon and by means thereof interstate commerce, and the said railroad company was then and

there a common carrier, and as such common carrier was then and there engaged in the carrying and transportation of interstate commerce and other freights from points along the line of the said railroad and its branches to points and places within and without the State of West Virginia; and on the day and year last aforesaid there was situate along the line of the said railroad and its branches and adjacent thereto the Pitts Vein Coal Company, the New York Mine Company, and the Rosemount Coal Company, and various and divers other persons, firms and corporations to the grand jurors unknown, each, respectively engaged as shippers and in furnishing for shipment, carrying and transportation interstate commerce and other freights over, upon and by means of the said railroad from points on the said railroad and its branches to points and places within and without the State of West Virginia; and the said Baltimore & Ohio Railroad Company being then and there engaged in the operation of the said Parkersburg Branch Railroad Company, and being then and there said common carrier engaged in the carrying and transportation of interstate commerce and other freights by means of and upon and over the said railroad, did then and there knowingly and unlawfully give, grant and practice an undue and unreasonable preference and advantage in respect to a division, allotment, apportionment and furnishing of cars and motive power owned, controlled and used by the said railroad comtived. So it has been said by the United States Supreme Court that where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the

pany upon and over the said railroad by giving, granting and furnishing to the said New York Mine Company, the said Rosemont Coal Company, and the said Fairmont Coal Company, and to the said other unknown persons, firms and corporations situate and being and unknown, as aforesaid, more than each of their respective proper and rightful share and quota of cars and motive power, and more than each were respectively and of right justly entitled to receive from the said railroad as shippers, for the carrying and transportation of property in interstate commerce and other freights over and upon and by means of the said railroad and its branches from points on the line of the said railroad to points and places within and without the State of West Virginia; and by failing and refusing to grant, give and furnish upon due and proper request and application therefor to the said Pitts Vein Coal Company its proper and rightful share and quota of cars and motive power, which it was justly and of right entitled to receive from the said railroad company for the carrying and transportation of property in interstate commerce, and then and there proposed and intended by said Pitts Vein Coal Company to be shipped over, upon and by means of

said railroad and its branches to points and places within and without the State of West Virginia, to the undue and unreasonable prejudice and disadvantage of the Pitts Vein Coal Company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

4. United States.—United States Cook, 17 Wall. (U. S.) United 21 L. Ed. 538; States Clark, 38 Fed. 500; United States v. Felderwald, 36 Fed. 490; United States v. McCormick, Cranch. C. C. 593; United States v. Pond, 2 Curt. 265.

**Alabama.**—Mosby v. State, 98 Ala. 50, 13 So. 148; Davis v. State, 39 Ala. 521.

Arkansas.—Mathews v. State, 24 Ark. 484; Bone v. State, 18 Ark. 109; Brittin v. State, 10 Ark. 299.

Connecticut.—State v. Powers, 25 Conn. 48; State v. Miller, 24 Conn. 522.

**Georgia.**—Williams v. State, 89 Ga. 483, 15 S. E. 552; Cook v. State, 26 Ga. 593; Elkins v. State, 13 Ga. 435.

Illinois.—Metzker v. People, 14 Ill. 101; Johnson v. People, 44 Ill. App. 642; Williams v. People, 20 Ill. App. 92, aff'd 121 Ill. 84, 11 N. E. 881. accused is not within the exception, but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defence and must

Indiana.—State v. Kimmerling, 124 Ind. 382, 24 N. E. 722; Hewitt v. State, 121 Ind. 245, 23 N. E. 83; Schneider v. State, 8 Ind. 410; Bouser v. State, 1 Ind. 408; Colson v. State, 7 Blackf. 590.

Iowa.—State v. Williams, 20 Iowa, 98; State v. Beneke, 9 Iowa, 203.

**Kentucky.**—Commonwealth v. Mc-Clanahan, 2 Metc. 8.

Louisiana.—State v. Lyons, 3 La. Ann. 154.

Maine.—State v. Gurney, 37 Me. 149; State v. Keen, 34 Me. 500; State v. Godfrey, 24 Me. 232.

Massachusetts.—Commonwealth v. Fitchburg R. R. Co., 10 Allen, 189; Commonwealth v. Maxwell, 2 Pick. 139.

**Michigan.**—People v. Decarie, 80 Mich. 578, 45 N. W. 491.

Missouri.—State v. Doerring, 194
Mo. 398, 92 S. W. 489; State v.
Hathaway, 106 Mo. 236, 17 S. W.
299; State v. Cox, 32 Mo. 566; State
v. Sutton, 24 Mo. 377; State v. Sparrow, 52 Mo. App. 374; State v. Seal,
47 Mo. App. 603; State v. Harris, 47
Mo. App. 558; State v. Finn, 38 Mo.
App. 504.

**Nebraska.**—Gee Woo v. State, 36 Neb. 241, 54 N. W. 513.

New Hampshire.—State v. McGlynn, 34 N. H. 422; State v. Abbott, 31 N. H. 434.

New Jersey.—State v. Price, 71 N. J. L. 249, 58 Atl. 1015; Mayer v. State, 64 N. J. L. 323, 45 Atl. 624; State v. Peters, 51 N. J. L. 244, 17 Atl. 115.

**New York.**—People v. Stedeker, 175 N. Y. 57, 67 N. E. 132.

North Carolina.—State v. Pool, 106 N. C. 698, 10 S. E. 1033; State v. Turner, 106 N. C. 691, 10 S. E. 1026.

**Ohio.**—Seville v. State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516; Stranglein v. State, 17 Ohio St. 453.

Oklahoma.—Parker v. Territory, 9 Okla. 109, 59 Pac. 9.

South Carolina.—Reynolds v. State, 2 Nott. & M. 365.

Tennessee.—Worley v. State, 11 Humph. 172.

Texas.—State v. Smith, 24 Tex. 285; Keizewetter v. State, 34 Tex. Cr. 513, 31 S. W. 395; Anderson v. State, 34 Tex. Cr. 96, 29 S. W. 384; Govitt v. State, 25 Tex. App. 419, 8 S. W. 478.

Utah.—State v. Williamson, 22 Utah, 248, 6 Pac. 1022, 83 Am. St. Rep. 780; People v. Parman, 7 Utah, 7, 24 Pac. 539; People v. Fairbanks, 7 Utah, 3, 24 Pac. 538.

Vermont.—State v. Smith, 61 Vt. 346, 17 Atl. 492; State v. Abbey, 29 Vt. 60; State v. Barker, 18 Vt. 195.

Virginia.—Commonwealth v. Hill, 5 Gratt. 682.

be shown by the accused.<sup>5</sup> And the rule is stated in similar words by other courts.<sup>6</sup>

§ 391. Same subject—Application of rule.—An indictment under the New York Penal Code for the crime of keeping a room for recording bets and selling pools upon the results of horse races should negative the fact that the case comes within the exception in the statute by averring that the room kept and occupied by the

Washington.—State v. Davis (Wash., 1906), 86 Pac. 201.

Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allège all the ingredients of which the offense is composed. U. S. v. Cook, 17 Wall (U. S.), 168, 21 L. Ed. 538; per Mr. Justice CLIFFORD.

Where a proviso or exception is embodied in a separate clause of a penal statute, and not in the clause creating the offense, it is not necessary that an indictment founded on the statute should negative the proviso or exception. Grattan v. State, 71 Ala. 344.

5. U. S. v. Cook, 17 Wall (U. S.), 168, 21 L. Ed. 538; per Mr. Justice CLIFFORD.

6. "It is well established that, when a statute creates a substantive criminal offense, the description of

the same being complete and definite, and by subsequent clause, either in the same, or some other section, or by another statute, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted cases need not be negatived in the indictment, nor is proof required to be made in the first instance on the part of the prosecution." State v. Connor, 142 N. C. 200, 55 S. E. 787.

"The rule of law is, that where the exception is contained in the body of the statute which creates the offense, and enters into it as a part of the description, in stating the offense it becomes necessary to negative the exception or to allege that the party charged does not come within the exception. If the exception is distinct from the enacting clause, or from that part of the statute which creates and describes the offense, it becomes matter of defense, and it need not be negatived that the respondent is within the exception." State v. Norton, 45 Vt. 258, 261. Per Boyce, J., citing State v. Barker, 18 Vt. 197; State v. Butler, 17 Vt. 149.

It is said in a case in Alabama that it is unnecessary to aver that the defendant did not come within the operation of the exceptions created by

### § 391 CHARGING THE OFFENSE—STATUTORY OFFENSES.

defendant was not on a race course authorized by statute. So if the statute prohibits the doing of a particular act without the authority of either one or two things, the indictment should negative the existence of both these before it can be sufficient. If the exception is stated in the enacting clause of the statute, it is ordinarily necessary to negative it in order that the description of the crime may correspond with the statute, as, if a statute imposes a penalty for the sale of spirituous liquors without a license; the indictment should aver the want of a license.8 So an indictment under an intoxicating liquor law making it a misdemeanor to have open or unlocked any door "to the room or rooms where any liquors are sold or kept for sale during the hours when the sale of liquors is forbidden, except when necessary for the egress or ingress of the person holding the liquor tax certificate authorizing the traffic in liquors at such place, or members of his family, or his servants, for purposes not forbidden by this act" should negative the exception in the statute as to the necessity of having such a door open or unlocked.9 And in this connection an indictment under the Elkins act,10 containing an allegation that there was a common arrangement between several carriers for the transportation of property over their roads and that the lowest total rate for petroleum products as shown by the printed tariff schedules was a certain sum per hundred pounds and that the product of the defendant was transported at a lower rate between certain points, was held not sufficient, it being necessary to negative the

the provisos of an act as this is a matter of defense which the prosecution is not required to anticipate, but that the rule is otherwise in the case of an exception which is incorporated in the enacting clause as it would then be necessary to negative it in order to bring the alleged crime within the words of the statute. Carson v. State, 69 Ala. 235.

- People v. Stedeker, 175 N. Y. 57,
   N. E. 398, decided under New York
   Pen. Code, § 351.
  - 8. State v. Williamson, 22 Utah,

- 248, 62 Pac. 1022, 83 Am. St. Rep. 780. Per MINOR, J.
- 9. People v. Lupton, 52 Misc. R. (N. Y.) 336, 103 N. Y. Supp. 172.

Necessity of negativing exceptions in indictment for violating liquor laws. See Johnson v. People, 44 Ill. App. 642; People v. Decarie, 80 Mich. 578, 45 N. W. 491; State v. Finn, 38 Mo. App. 504; State v. Harris, 47 Mo. App. 558; State v. Paige, 78 Vt. 286, 62 Atl. 1017.

10. Act Feb. 19, 1903, c. 708, 32

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existence of a joint through rate lower than the total of the locals.<sup>11</sup> Under this act, however, it is held sufficient in another case to aver that the defendant did wilfully and unlawfully grant and pay certain rebates and concessions without negativing the existence of such facts and circumstances as would make the payment of them legal.<sup>12</sup>

St. 847, U. S. Comp. Stat. Supp. 1905, c. 599.

11. United States v. Standard Oil Co., 148 Fed. 719.

12. United States v. Chicago St. P. M. & O. Ry. Co., 151 Fed. 84; see further as to indictments under this act §§ 374, 382 herein.

#### DUPLICITY - JOINDER OF OFFENSES.

#### CHAPTER XIV.

#### DUPLICITY — JOINDER OF OFFENSES — OF PARTIES.

- Section 392. Duplicity-Joinder of offenses in one count-General rule.
  - 393. Same subject-Application of rule.
  - 394. Charging in different counts—Different offenses—Generally— Election.
  - 395. Charging in different counts—Different offenses—Generally—Continued.
  - 396. Same subject—Different felonies.
  - 397. Same subject continued-Election.
  - 398. Charging different misdemeanors.
  - 399. Where several acts may constitute offense.
  - 400. Different means or manner of committing offenses-Single count.
  - 401. Same subject continued-Application of rule.
  - 402. Several counts stating offense-Different ways and means.
  - 403. Same subject-Application of rule.
  - 404. Different offenses resulting from same act.
  - 405. Same subject—Application of rule—Joinder of counts for larceny and other offenses.
  - 406. Same subject—Further application of rule.
  - 407. Continuous acts as one offense.
  - 408. Same subject continued.
  - 409. Offenses of different degree or grade.
  - 410. Offenses of different degree or grade—Application of rule.
  - 411. Conspiracy to do criminal act and commission of act.
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  - 413. Joinder of a felony and misdemeanor.
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  - 416. Offense affecting different articles-Different owners.
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- 423. Joinder of parties-Generally.
- 424. Necessity of joinder of parties.
- 425. Effect of joinder of parties.
- 426. Who may be joined as defendants.
- 427. Joinder of husband and wife.
- 428. Principal and accessory or aider and abettor—Principals in first and second degree.

Sec. 392. Duplicity — Joinder of offenses in one count — General rule.—It is a general rule of criminal pleading that the charge against the accused must not be stated in such a manner as to render the indictment subject to the objection of duplicity, which is said to be a fault in all pleading in that it tends to confusion and the multiplication of issues. And the rule may be

1. Sprouse v. Commonwealth, 51 Va. 376, wherein it is said that duplicity or double pleading consists in alleging for one single purpose or object, two or more distinct grounds of complaint, when one of them would be as effectual in law as both or all.

Mode of taking advantage of defect of duplicity - Effect of verdict .- The defect of duplicity in an indictment may be taken advantage of by demurrer. People v. Shotwell, 27 Cal. 394; Simons v. State, 25 Ind. 331; State v. Henn, 39 Minn. 464, 40 N. W. 564; People v. Klipfel, 160 N. Y. 371, 54 N. E. 788, 14 N. Y. Cr. R. 169, aff g 37 App. Div. 224, 55 N. Y. Supp. 789. Compare Rooler v. United States, 127 Fed. 509, 62 C. C. A. 307, as to practice in Federal courts. Where two or more offenses are charged the generally accepted rule is that the indictment may on motion be quashed or the prosecutor be compelled to elect on which charge he intends to proceed. Fisher v. State, 33 Tex. 792. And where no attempt is made to have an indictment quashed on the ground of duplicity, and no motion is made to require the State to elect it is too late after verdict to raise this objection. State v. Wilson, 143 Mo. 334, 44 S. W. 722. So it is said that it is too late after verdict to raise the question of duplicity by a motion in arrest of judgment where it does not appear that the substantial rights of the accused have been prejudiced by the joinder. Morgan v. United States. 148 Fed. 189 (C. C. A.). This doctrine is sustained by numerous decisions.

California.—People v. Shotwell, 27 Cal. 394.

**Georgia.**—Lampkin v. State, 87 Ga. 516, 13 S. E. 523.

Indiana.—Simons v. State, 25 Ind. 331.

Massachusetts.—Commonwealth v. Jacobs, 152 Mass. 276, 25 N. E. 463; Commonwealth v. Ryan, 152 Mass. 283, 25 N. E. 465.

stated as well settled that two or more distinct offenses must not be charged in the same count of an indictment.<sup>2</sup> And it is said in this connection that no rule of criminal pleading is better established than that which prohibits the joinder of two or more substantive offences in the same count. A substantive offence is one which is complete of itself, and is not dependant upon another.

North Carolina.—State v. Cooper, 101 N. C. 684, 8 S. E. 134.

Wisconsin.—Ketchingman v. State, 6 Wis. 426.

But in an early case in South Carolina it is held that where a defendant is found guilty on a count which charges two distinct offenses he may avail himself of the objection by a motion in arrest of judgment. State v. Howe, 1 Rich. L. (S. C.) 260.

When duplicity clearly exists it is sufficient ground for sustaining a motion to quash. Herron v. State, 17 Ind. App. 164, citing Davis v. State, 100 Ind. 154; Joslyn v. State, 128 Ind. 160, 27 N. E. 492; Knopf v. State, 84 Ind. 316; Fahnestock v. State, 10 Ind. 156.

2. United States.—United States v. Smith, 152 Fed. 542; United States v. Sharp, Pet. C. C. 131.

**Alabama.**—Burgess v. State, 44 Ala. 190; Ben v. State, 22 Ala. 9, 58 Am. Dec. 234n.

Florida.—Magahagin v. State, 17 Fla. 665.

Indiana.—State v. Weil, 89 Ind. 286; Knopf v. State, 84 Ind. 316.

**Kansas.**—State v. Wester, 67 Kan. 810, 74 Pac. 239; State v. Lund, 49 Kan. 209, 30 Pac. 518.

Kentucky.—Commonwealth v. Powell, 71 Ky. 7.

La. 479, 32 So. 478; State v. Jacques,

45 La. Ann. 1451, 14 So. 213; State v. Johns, 32 La. Ann. 812; State v. Charles, 18 La. Ann. 720.

Maine.—State v. Palmer, 35 Me. 9.
Massachusetts.—Commonwealth v.
Symonds, 2 Mass. 162.

Michigan.—Chase v. Van Buren (Mich. 1907), 111 N. W. 750; People v. Van Alstine, 57 Mich. 69, 23 N. W. 594.

Minnesota.—State v. Coon, 14 Minn. 456.

Mississippi.—Breeland v. State, 79 Miss. 527, 31 So. 104; State v. Brown (Miss.), 28 So. 752.

Missouri.—State v. Fox, 148 Mo. 517, 50 S. W. 98; State v. Bridges, 24 Mo. 353; State v. Bach, 25 Mo. App. 554; State v. Green, 24 Mo. App. 227.

New Hampshire.—State v. Gorham, 55 N. H. 152.

New Jersey.—Farrell v. State, 54 N. J. L. 416, 24 Atl. 723.

New York.—Woodford v. People, 62 N. Y. 117; People v. Wright, 9 Wend. 193; People v. Stock, 21 Misc. R. 147, 47 N. Y. Supp. 94; People v. Frazier, 36 Misc. R. 280, 73 N. Y. Supp. 446; Reed v. People, 1 Park Cr. R. (N. Y.) 481.

North Dakota.—State v. Mattison, 13 N. D. 391, 100 N. W. 1091.

Ohio.—Myers v. State, 4 Ohio C. C. 570.

Pennsylvania.—Fulmer v. Com-

When several acts relate to the same transaction, and together constitute but one offense, they may be charged in the same count, but not otherwise. Each count in an indictment must stand or fall by itself. The jury cannot find a verdict of guilty as to one part and not guilty as to another part of the same count. This strictness of pleading is necessary in order that the accused may not be in doubt as to the specific charge against which he is called to defend, and that the court may know what sentence to pronounce. When two or more independent offences are joined in

monwealth, 97 Pa. St. 503; Commonwealth v. Hall, 23 Pa. Super. Ct. 104; Commonwealth v. Delamater, 2 Pa. Dist. Rep. 118.

Rhode Island.—State v. Custer (R. I. 1907), 66 Atl. 309.

South Carolina.—State v. Howe, 1 Rich. L. 260.

Tennessee.—Greenlow v. State, 4 Hump. 25; State v. Ferris, 3 Lea, 700.

**Texas.**—Fisher v. State, 33 Tex. 792; Crow v. State (Ter. Cr. 1905), 90 S. W. 650.

West Virginia.—State v. Gould, 26 W. Va. 258.

The criminal law does not permit the joinder of two or more offenses in one count. We must consider what are two or more distinct offenses within the rule stated. It is not an objection to an indictment that a part of the allegations might be lopped off and the indictment remain sufficient, and although the charge might be branched out into two offenses, if the whole be but parts of one fact of endeavor, all the parts may be stated together. Of this there are familiar illustrations. accused might be charged with selling

the different kinds of liquor contrary to law; the sale of each kind would be an indictable offense, yet an indictment setting forth a violation of the law in selling all would not be to charge several distinct offenses. A man may be indicted for the battery of two or more persons in the same count, yet the battery of each was an offense; yet they may be charged together, because they are but parts of one endeavor-the offense against the commonwealth being the breach of the peace. Or a libel upon two or more persons when the publication is one single act, may be charged in one court without rendering it bad for duplicity under the rule stated above. Or in robbery with having assaulted two persons and stolen from one a sum of money and from the other a different sum if it was all one transaction. Or where two make an assault with an intent to kill, with different weapons, they may charge jointly in one count. And if a man shoots at two persons to kill either regardless of which, he may be convicted on a charge of a joint assault, yet either assault was an offense. Sprouse v. Commonwealth, 51 Va. 376.

the same count it will be bad for duplicity.<sup>3</sup> This rule, however, is said not to apply where the offenses described are cumulative.<sup>4</sup> And a defect arising from a fact that two or more offences are charged in one count has been held to be a mere defect of form which is cured by verdict.<sup>5</sup>

§ 393. Same subject - Application of rule. - An indictment charging in the same count an assault with intent to maim and an assault with intent to kill is bad for duplicity in that it charges two distinct offenses.<sup>6</sup> And an indictment is defective which charges in one count the two offenses of stabbing any person with intent to commit murder, and that of inflicting with a dangerous weapon a wound less than mayhem.7 So an indictment which charged the defendant, as a member of a board of supervisors, possessing the power to audit and allow claims against the county, with knowingly and corruptly using the power to allow a dishonest demand, and to authorize the county auditor to pay it, in violation of the Penal Code in New York,8 and which also charged him with presenting a fraudulent claim, being the same claim presented to the county auditor or to an auditing board for allowance and payment, in violation of the Penal Code,9 was held bad for duplicity, within the Code of Criminal Procedure, 10 in that it charged, in one count, two specific crimes.<sup>11</sup> And in another case in New York it is held that where in an indictment for

3. State v. Smith, 61 Me. 388, per DICKERSON, J.

4. Louisiana.—State v. Markham, 15 La. Ann. 498; State v. Banton, 4 La. Ann. 31.

Massachusetts.—Commonwealth v. Turtchell, 4 Cush. 74.

Missouri.—State v. Fletcher, 18

New York.—Le Bean v. People, 33 How. Pr. 66.

South Carolina.—State v. Meyer, 1 Spears, 305; State v. Helgen, 1 Spears, 310.

Wisconsin.—State v. Brelby, 21 Wis. 204.

State v. Fox, 148 Mo. 517, 50 S.
 W. 98.

6. State v. Leavitt, 87 Me. 72, 32 Atl. 787.

- 7. State v. Johns, 32 La. 812.
- Section 165.
- 9. Section 672.
- 10. Section 278.
- 11. People v. Stock, 21 Misc. Rep. (N. Y.) 147, 47 N. Y. S. 94.

forgery two distinct offenses requiring different punishments are alleged in the same count, as where the forging of a mortgage and of a receipt endorsed thereon are both charged in the same count, and the defendant is convicted, the judgment will be arrested. Again an indictment setting forth an offence of omission and also an offence of commission in the same count is bad. But where the gist of an offense was the bringing into town of intoxicating liquors with one or more of the illegal intents specified in the statute it was held that the offense might properly be charged in one count although more than one intent was alleged. And in an early case in Alabama it was held that an indictment under a statute declaring that no "cruel or unusual punishment" should be inflicted on any slave was not bad for duplicity in that it charged both the cruel and unusual punishment of a slave. 15

§ 394. Charging in different counts — Different offenses — Generally — Election.—In determining what offenses may be charged it has been decided that kindred offenses which are generic in kind growing out of the same act may be charged in the same indictment provided they be incorporated in separate counts. <sup>16</sup> And different offenses may be joined in the same indictment in different counts, if the offenses are subject to the same punishment. <sup>17</sup> So it is a generally accepted rule that two offenses, committed by the same person, may be included in the same indictment, in different counts, where they are of the same general nature, and belong to the same family of crimes, and where the

People v. Wright, 9 Wend. (N.
 Y.) 193.

13. State v. Coon, 14 Minn. 456; holding that an indictment against defendant for "wilfully neglecting his duty as a justice of the peace, and for misbehavior in office as a justice of the peace, is bad as charging two distinct offenses.

Compare People v. Kane, 61 N. Y. Supp. 195, 632, 43 App. Div. 472, 14 N. Y. Cr. R. 316.

14. Commonwealtn v. Brothers,

158 Mass. 199, 33 N. E. 339, citing Commonwealth v. Moody, 143 Mass. 177, 9 N. E. 511; Commonwealth v. Ferry, 146 Mass. 203, 208, 15 N. E. 484; Commonwealth v. Clancy, 154 Mass. 128, 132, 27 N. E. 1001.

15. Turnipseed v. State, 6 Ala. 664.

16. State v. Jones, 52 La. Ann. 211, 26 So. 782; State v. Wren, 48 La. Ann. 803, 19 So. 745; State v. Cook, 42 La. Ann. 85, 7 So. 64.

17. Baker v. State, 4 Ark. 56.

mode of trial and nature of the punishment are also the same, although they may be punishable with different degrees of severity. 18 In this connection, however, it is declared that it is bad practice and that the state upon motion may, in the discretion of the court, be compelled to elect upon which she will proceed; but that if no motion to that effect is made, the judgment after verdict will not be arrested. 19 So in another case it is decided that several counts for different offences may be joined in the same indictment, where the judgment on conviction of either is the same and in such case it is usual to require the solicitor to elect upon which count he will try the accused before he commences the examination of the witnesses. A refusal to quash for such alleged misjoinder is no ground for arrest of judgment.20 And again it is decided that an indictment which charges two distinct which of the offenses are not part same transaction connected is bad for duplicity are not and that the state may be required to elect as to which offense it will pro-

18. Alabama.—Wooster v. State, 55 Ala. 217; Johnson v. State, 29 Ala. 62.

Georgia.—Lascelles v. State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. —; Williams v. State, 72 Ga. 180.

Maine.—State v. Welch, 79 Me. 95, 8 Atl. 347; State v. Burke, 38 Me. 574; State v. Nelson, 29 Me. 329.

Missouri.—Frazier v. State, 5 Mo. 536.

**Tennessee.**—Tucker v. State, 8 Lea. 633.

**Texas.**—Owens v. State, 35 Tex. Cr. 345, 33 S. W. 975.

Wisconsin.—Jackson v. State, 91 Wis. 253, 64 N. W. 838.

It is well settled, both in England and in the United States, that distinct offenses, of the same degree, may be joined in the same indictment. Strawhern and Grizzle v. State, 37 Miss. A. 422.

Two or more offenses may well be charged in one indictment as having been committed by the same defendant where the offenses are of the same character. Lowe v. State, 134 Ala. 154, 156, 32 Aal. 273.

19. Tearn v. Mayers, 53 Miss. 458.

Matter in discretion of court.

Whether the State should be put to its election, and if so at what stage of the trial, are matters for the discretion of the trial court. If the accused will be confounded in his defense or deprived of the protection of legal rules by requiring him to answer both charges before the same jury, the court will not compel it. But the offenses may be so related to each other that justice will seem to demand a joint trial. State v. Darling, 77 Vt. 70.

20. State v. King, 84 N. C. 737.

ceed upon.<sup>21</sup> It is held, however, that an election between counts cannot be required on the ground that distinct offenses are charged where they are committed by the same acts at the same time, and the same testimony must be relied on for conviction.<sup>22</sup> mon law rule is that if an indictment contains charges distinct in themselves and growing out of separate transactions, the prosecutor may be made to elect, or the court may quash. But when it appears that the several counts relate to one transaction, varied simply to meet the probable proofs, the court will neither quash nor enforce an election.<sup>23</sup> And in this connection it is said that the effect of a union in the same indictment of several counts for distinct offences is different, where such distinct offences grow out of the same transaction, and when such offences had no connection the one with the other. In the first class, our courts have held that it was the duty of the judge to instruct the jury as to the effect of a general verdict of guilty, which is understood to carry the highest offense alleged, if there is testimony to support it, so that the jury may shape their verdict so as to conform to their real convictions by finding upon each count separately. In the second class of cases, it is the duty of the presiding judge, without waiting for a motion to that end from the defendant, to order the prosecuting officer to elect upon what charge he will confine the trial.<sup>24</sup> And in another case it is decided that if the indictment contains different counts which are in fact for separate and distinct offenses, and this fact appears on the opening of the cause, or at any time before the jury are

21. State v. Fidment, 35 Iowa, 541; Burgess v. State, 81 Miss. 482, 33 So. 499. See also State v. Caine (Iowa, 1906), 105 N. W. 1018; People v. Flaherty, 162 N. Y. 532, 57 N. E. 73, rev'g 27 App. Div. 535, 50 N. Y. Supp. 574.

22. People v. Sweeney, 55 Mich. 586, 22 N. W. 50. Compare United States v. Harmon, 38 Fed. 827.

If the different counts in an indictment for murder purporting

to be for distinct and separate offenses, are inserted in good faith for the purpose of meeting a single charge, the court will neither quash the indictment, nor compel the prosecutor to elect upon which count he will proceed to trial. State v. Smith, 24 W. Va. 815.

23. State v. Morrison, 85 N. C. 562.

24. State v. Woodward, 38 S. C. 355, 17 S. E. 135.

sworn for the trial thereof, the court may quash the same lest it may confound the prisoner in his defense or prejudice his challenges of the jury; and in such case, if the defect is discovered after the jury are sworn and before the verdict is found the court may require the prosecutor to make his election on which charge he will proceed.<sup>25</sup> Where a count of an indictment charges more than one substantive offense the election of the state to place the defendant on trial for one of the offenses so charged amounts to an abandonment of the other charges which thereupon cease to be parts of the indictment.<sup>26</sup>

§ 395. Charging in different counts — Different offenses — Generally—Continued.—Where there are different counts in an indictment it has been declared that it is necessary to show by the averments that the offense changed in each is different from those charged in the others,<sup>27</sup> and that every separate count should charge the defendant as if he had committed a distinct offense, because it is upon the principle of the joinder of offenses that the joinder of counts is permitted.<sup>28</sup> But in an early case in Virginia it is held that where in an indictment for murder there are two counts the fact that in the second count the offense is not set out as another offense is not error.<sup>29</sup> And where the same offense is described in different counts, it is held that it is not necessary to allege the offense described in each of the several counts as other and different from that described in the others.<sup>30</sup>

- 25. State v. Smith, 24 W. Va. 815.
- 26. Mills v. State, 52 Ind. 187.
- 27. State v. Von Haltschwherr, 72 Iowa, 541, 34 N. W. 323, so holding where several counts in the same language in an information each charged the sale of intoxicating liquors "to a person whose name is unknown to affiant" and there was nothing in the language used to show that the offense intended to be charged was a different offense from that charged in either of the others. In this case it

was held that a demurrer should have been sustained to all but one of the counts or the State should have been required to elect on which count it would stand.

28. Baker v. State, 4 Ark. 56; State v. Lincoln, 49 N. H. 464, citing 1 Chitty Cr. Law, 249; I Bishop on Cr. Proc., §§ 183, 184, 197. See also Commonwealth v. Ault, 10 Pa. Super. Ct. 651.

- 29. Lazier v. Commonwealth, 10 Gratt. (Va.) 708.
  - 30. State v. Rust, 35 N. H. 438,

So it is decided that an indictment may charge the same offense in several counts in several ways for the purpose of meeting the evidence and though it is usual to charge the offense as if the offense in each count was a distinct offense vet this is said to be matter of form and an indictment is not on this account defective.31 "The introduction of several counts which merely describe the same transaction in different ways, gives the public prosecutor greater latitude in proof, so as to avoid a variance, for if not sufficient to sustain one count it might another."32 where, offenses of the same character and subject to the same punishment may be committed with different intents, such intents may be alleged in the same count in the alternative; they may also be alleged in separate counts of the same indictments.<sup>33</sup> And an information charging an assault with a deadly weapon is not bad for duplicity on the ground that it alleges the assault was made "without considerable provocation, and with a wilful, malignant and abandoned heart."34

wherein it is said "when only a single offense is described in different counts, it is manifestly unnecessary and improper to allege and charge the offense described in each count as distinct and different from that described in all the others." FOWLER, J. But see State v. Ruby, 68 Me. 545, holding that the same offense may be stated in different ways in as many counts as are deemed necessary, and that every separate count is required to charge a distinct offense, upon the ground that the law allows the joinder of several dictinct offenses.

31. State v. Brady, 16 R. I. 51, 12 Atl. 238; State v. Doyle, 15 R. I. 527, 9 Atl. 900. See People v. Charbineau, 115 N. Y. 433, 22 N. E. 271, 26 N. Y. St. R. 490.

32. Baker v. State, 4 Ark. 56, 59. Per DICKINSON, J.

The indictment may contain as many counts as are necessary to meet the contingencies of the evidence, without necessitating an election. Mathews v. State, 10 Tex. App. 279, citing Dill v. State, 1 Tex. App. 278; Weathersby v. State, 1 Tex. App. 643; Dalton v. State, 4 Tex. App. 333; Irving v. State, 8 Tex. App. 46.

It is not only permissible, but commendable, to insert in an indictment as many counts as will be necessary to provide for every possible contingency in the evidence. Shubert v. State, 20 Tex. App. 330.

33. Carleton v. State, 100 Ala. 131; see Commonwealth v. Igo, 158 Mass. 199, 33 N. E. 339; State v. Ward, 61 Vt. 214, 17 Atl. 483.

34. State v. Townsend, 7 Wash.

§ 396. Same subject — Different felonies.—Several felonies of the same class may be joined in different counts in the same indictment, and it is not error to refuse to require the State to elect upon which one the defendant shall be tried.<sup>35</sup> So in a case in Kansas it is declared that several separate and distinct fellonies may be charged in separate counts of one and the same information where all the offenses charged are of the same general character, requiring the same mode of trial, the same kind of evidence and the same kind of punishment, and that the defendant may be tried upon all the several counts at one and the same time;

462, 35 Pac. 367. "But the one crime only is charged, and that is an assault with a deadly weapon with intent to do great bodily harm, and when that is coupled with either of the conditions, namely, 'without considerable provocation' or 'with a wilful, malignant and abandoned heart,' a crime is made out; and it is as clearly made out when both the conditions accompany the act as when it is accompanied by one, and is exactly the same crime in both instances; either condition constitutes the crime; both together do no more." Per Dunbar, C. J.

**35. Alabama.**—Cawley v. State, 37 Ala. 152; Henry v. State, 33 Ala. 389; Covy v. State, 4 Port. 186.

Arkansas.—Orr v. State, 18 Ark. 540; Baker v. State, 4 Ark. 56.

**Georgia.**—Jones v. State (Ga. 1907), 58 S. E. 558; Stephen v. State, 11 Ga. 225.

Indiana.—Merrick v. State, 63 Ind. 330; McGregor v. State, 16 Ind. 9; Hudson v. State, 1 Blackf. 317.

**Kansas.**—State v. Hodges, 45 Kan. 389, 26 Pac. 676.

Louisiana.—State v. Cazeau, 8 La. Ann. 114. Maine.—State v. Hood, 51 Me. 363; State v. Andrews, 17 Me. 103.

Massachusetts.—Benson v. Commonwealth, 158 Mass. 164, 33 N. E. 384; Commonwealth v. Jacobs, 152 Mass. 276, 25 N. E. 463; Commonwealth v. Mullen, 150 Mass. 394, 23 N. E. 51; Commonwealth v. Hills, 10 Cush. 530.

Michigan.—People v. McKinney, 10 Mich. 54.

Mississippi.—Sarah v. State, 28 Miss. 267.

Missouri.—Storrs v. State, 3 Mo. 9.

New York.—Kane v. People, 8 Wend. 203; Coats v. People, 4 Park. Cr. R. 662.

Ohio.—Bailey v. State, 4 Ohio St.

Tennessee.—Cash v. State, 10 Humph. 111.

Utah.—United States v. West, 7 Utah, 437, 27 Pac. 84.

See also cases cited in preceding section.

The rule is well settled that several distinct felonies, of the same general nature, may well be charged in separate counts of the same indictment. Henry v. State, 33 Ala. 389,

all resting in the sound judicial discretion of the trial court.36 And in a case in Missouri it is said that "It is the common and approved practice in this State, to charge in the same indictment several distinct felonies, when all relate to the same transaction and admit of the same legal judgment."37 And in an earlier case in the same State it was decided that where the offenses charged in an indictment, containing several counts, were all of the same nature, founded on the same section of the statute, and upon which the same judgment could have been rendered if the evidence sustained any of the counts, the jury had a right to find a general verdict as there was no misjoinder.38 So the crimes of embezzlement and larceny may, it is held, be properly joined in different counts in an indictment.<sup>39</sup> And the offenses of obtaining money under false pretenses and larceny from the person may be joined in different counts in the same indictment.<sup>40</sup> But while under the common law, an indictment for a felony might under certain circumstances, allege in separate counts any number of distinct felonies, provided they were of the same general nature, or were connected with the same transaction, yet even under that system of criminal procedure no rule was better settled than that which prohibited the joinder of two or more substantive offenses in the same count. The rule was necessary in order that the accused might not be in doubt as to the specific charge against which he was called to defend himself; that the court might know what sentence to pronounce, and that the accused might be fully protected against any other prosecution for the same offense.41 But descriptive inconsistencies in the several counts of an indictment. with respect to the place of the death of the victim of a murder, or

<sup>397.</sup> Per R. W. WALKER, J., citing Johnson v. State, 29 Ala. 65; Commonwealth v. Hill, 10 Cush. (Mass.) 530; Sarah v. State, 28 Miss. 267.

**<sup>36.</sup>** State v. Hodges, 45 Kan. 389, 26 Pac. 677.

<sup>37.</sup> State v. Houx, 109 Mo. 660, 19S. W. 35, 32 Am. St. Rep. 686.

<sup>38.</sup> Fasier v. State, 5 Mo. 536.

<sup>39.</sup> Mayo v. State, 30 Ala. 32; Murphy v. People, 104 Ill. 528; Stephens v. State, 53 N. J. L. 245, 21 Atl. 1038; Coats v. People, 4 Park. Cr. R. (N. Y.) 662.

<sup>40.</sup> Johnson v. State, 29 Ala. 62.41. State v. Mattison, 13 N. Da.

<sup>393, 100</sup> N. W. 1091.

of the instruments used, do not show that several felonies are embraced in such indictment; in legal intendment but a single offense is described.<sup>42</sup>

§ 397. Same subject continued — Election.—It is held that the only mode of objecting to the joinder of several distinct felonies in one indictment is by a motion to the trial court, before plea, to quash the indictment, or in a subsequent stage of the proceedings to apply to compel the prosecutor to elect which charge he will proceed upon.<sup>43</sup> So in cases of felony, where two or more distinct and separate offences are contained in the same indictment, it may be quashed, or the prosecutor compelled to elect upon which charge he will try the accused.44 And where upon the trial distinct transactions are developed, it is said that at the request of the defendant, the State should be forced to elect upon which count or transaction it will prosecute.45 But in another case it is decided that though where two or more distinct felonies arising out of different transactions are charged in the same indictment or information the prosecutor may, on motion of the accused, be compelled to elect upon which he will proceed yet that such objection must be made before trial and verdict, otherwise it will be waived.46 The practice, however, of joining distinct felonies in the same indictment, is not to be commended; and although the joinder of distinct offenses in the same indictment constitutes no legal ground for quashing the indictment; yet if objection, on that ground, be made before plea, the court, at its discretion, may order the indictment to be quashed, lest it should embarrass the prisoner in his defence, or prejudice him in his challenge to the jury.47 So where separate and distinct

**<sup>42</sup>**. Hunter v. State, 40 N. J. L. 495.

**<sup>43</sup>**. Hunter v. State, 40 N. J. L. 495, 523.

<sup>44.</sup> Kane v. The People, 8 Wend. (N. Y.) 203; see also State v. Kibby, 7 Mo. 317.

<sup>45.</sup> McKenzie v. State, 32 Texas, 575.

<sup>46.</sup> Blodgett v. State, 50 Neb. 121, 69 N. W. 751, citing Thompson v. People, 4 Neb. 524; Aiken v. State, 41 Neb. 263, 59 N. W. 888.

<sup>47.</sup> Strawhern and Grizzle v. State. 37 Miss. 428.

felonies are charged in different counts in the same indictment, the court has a discretion to compel the prosecuting attorney to elect the counts he intends to rely upon and it is said that the court will not interfere unless the prisoner is embarrassed in his plea or challenges in consequence of the separate felonies charged in the one indictment.48 So it is decided in an early case that where two distinct felonies are charged in different counts it is not a matter of legal right pertaining to the accused, that the State should be compelled to elect for which one of the offenses it will prosecute; nor will the court compel such election where the two counts are joined, in good faith, for the purpose of meeting a single offense. It is a practice sanctioned by common custom, and by the law, to charge a felony in different ways, in different counts of the indictment so as to provide for the different phases which the evidence may present upon the trial; and where such is the bona fide purpose of the joinder of counts the court never exercises its power of quashing the indictment, or compelling an election. 49 And it is said by the United States Supreme court "while recognizing as fundamental the principle that the court must not permit the defendant to be embarrassed in his defence by a multiplicity of charges embraced in one indictment and to be tried by one jury, and while conceding that regularly or usually an indictment should not include more than one felony, the authorities concur in holding that a joinder in indictment, in separate counts, of different felonies at least of

48. People v. Johnson, 2 Wheeler's Cr. Cas. (N. Y.) 361.

49. Mayo v. State, 30 Ala. 32; per WALKER, J., who said: "The principle to be extracted from the authorities is said to be that where two distinct felonies are charged in different counts, it is not a matter of legal right pertaining to the accused, that the State should be compelled to elect for which one of the offices it will prosecute; nor will the court compel such election, where the two

counts are joined, in good faith, for the purpose of meeting a single offense. It is a practice sanctioned by common custom, and by the law, to charge a felony in different ways, in different counts of the indictment, so as to provide for the different phases which the evidence may present upon the trial, and where such is the bona fide purpose of the joinder of counts, the court never exercises its power of quashing an indictment, or compelling an election."

the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment upon demurrer or upon motion to quash or on motion in arrest of judgment and does not, in every case, by reason alone of such joinder, make it the duty of the court, upon motion of the accused to compel the prosecutor to elect upon what one of the charges he will go to trial. court is invested with such discretion as enables it to do justice between the government and the accused. If it be discovered at any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony among two or more of the same class, the court according to the established principles of criminal law, can compel an election by the prosecutor."50 And in a case in Massachusetts it is said "this court has often held, that distinct felonies, if of the same general description, and if the mode of trial and the nature of the punishment are the same, may be charged in the same indictment, and may be tried together, unless the court shall direct the government, to proceed upon one count or set of counts only, if it sees any danger that the defendant will be embarrassed by the multiplicity of the charges And it has also been distinctly held, that against him, . . . whether the charges shall be tried separately or together is a matter within the discretion of the presiding judge, and that if a general verdict of guilty is returned upon counts charging distinct offense, and no inquiry is made of the jury as to the counts upon which they found their verdict, the general verdict of guilty will apply to each count."51 And it is a rule of the common law and also in those states where there are no statutory provisions to the contrary that where there are several counts in an indictment charging the defendant with more than one distinct and separate felony the court may in its discretion either require an election by the prosecutor as to the count upon which he will proceed or in

<sup>50.</sup> Pointer v. United States, 151 U.
51. Benson v. Commonwealth, 158
S. 396, 403, 14 Sup. Ct. 410.
Mass. 164, 166, 33 N. E. 384.

a clear case quash the indictment.<sup>52</sup> So as a general rule where an indictment charges several felonies in distinct counts the court at the trial has a discretion in respect to compelling the district attorney to elect upon which count he will proceed and the decision of the court in regard thereto is not the subject of a writ of error or of a bill of exceptions.<sup>53</sup>

§ 398. Charging different misdemeanors.—Separate public offenses, where they are all misdemeanors of a kindred character, and charged against the same person, may generally be joined in separate courts in an indictment or information to be followed by one trial for all with a separate conviction and punishment for each, the same as though all such offenses were charged in separate indictments or informations and tried at different times.<sup>54</sup>

State v. Blakeney, 96 Md. 711,
 Atl. 614; State v. McNally and
 Myers, 55 Md. 559.

People v. Baker, 3 Hill (N. Y.), 159. See also McGregor v. State, 16 Ind. 9; Hunter v. State, 40 N. J. L. 523; State v. Banknight, 55 S. C. 353, 33 S. E. 451, 74 Am. St. Rep. 751. Compare Gardes v. United States, 87 Fed. 172, 30 C. C. A. 596.

**54. United States.**—United States v. Belvin, 46 Fed. 381; United States v. Nye, 4 Fed. 891.

Kansas.—State v. Chandler, 31 Kan. 204.

Maryland.—State v. Blakeney, 96 Md. 711, 54 Atl. 614.

Mississippi.—Jones v. State, 67 Miss. 111, 7 So. 220.

Nebraska.—Little v. State, 60 Neb. 749, 84 N. W. 248, 51 L. R. A. —; Hans v. State, 50 Neb. 150, 69 N. W. 838; Martin v. State, 30 Neb. 507, 46 N. W. 621; Burrell v. State, 25 Neb. 581, 41 N. W. 399. New Jersey.—Stephens v. State, 53 N. J. L. 245, 21 Atl. 1038; Stone v. State, 20 N. J. L. 404.

New York.—People v. Costello, 1 Den. 83.

North Carolina.—State v. Morgan, 133 N. C. 743, 45 S. E. 1033; State v. Slagle, 82 N. C. 653.

**Texas.**—Stebbins v. State, 31 Tex. Cr. 294, 20 S. W. 552.

Virginia.—Mitchell v. Commonwealth, 93 Va. 775, 20 S. E. 892.

Wisconsin.—State v. Gummer, 22 Wis. 441.

In Michigan the doctrine that a person should not be subjected to trial for two separate and distinct offenses at one time, has been applied to misdemeanors. People v. Rohrer, 100 Mich. 126, 58 N. W. 661; per HOOKEE, J., citing People v. Jenness, 5 Mich. 305; Tiedke v. Saginaw, 43 Mich. 64; People v. Aikin, 66 Mich. 460; People v. Jackman, 96 Mich. 269, 274.

So in an early case in New York it is declared that it is well settled law that several misdemeanors may be joined in the same indictment, and a conviction for all may take place at the same trial.<sup>55</sup> And this doctrine is asserted in other decisions in the same State.<sup>56</sup>

§ 399. Where several acts may constitute offense.—Where acts of omission or commission are component parts or represent preliminary stages of a single transaction, to set them out is not to charge separate crimes.<sup>57</sup> And it is a general rule that where several acts go to constitute an offense an indictment charging such acts where they are a part of the same transaction is not on this account duplicitous.<sup>58</sup> So in a case in New York it is de-

People v. Costello, 1 Den. (N.
 Y.) 90.

56. In cases of misdemeanor, punishable by fine and imprisonment the prosecutor may join several distinct offenses in the same indictment and try them at the same time. Kane v. People, 8 Wend. (N. Y.) 203.

The joinder of several distinct misdemeanors in the same indictment is not a cause for the reversal of the judgment on writ of error when the sentence is single, and is appropriate to either of the counts upon which the conviction was had. Polinsky v. People, 73 N. Y. 69, citing Kane v. People, 8 Wend. 203; People v. Rynders, 12 Wend. 425; People v. Costello, 1 Denio, 83; People v. Baker, 3 Hill, 159; People v. Liscomb, 60 N. Y. 589.

57. People v. Kane, 61 N. Y. Supp. 195, 632, 43 App. Div. 472, 14 N. Y. Crim. 316; per Jenks, J., citing Boland v. People, 25 Hun, 427, affirmed in 90 N. Y. 678; Reed v.

People, 86 N. Y. 382; Woodford v. People, 62 N. Y. 128; Osgood v. People, 39 N. Y. 451.

**58. United States.**—United States v. Cutajar, 60 Fed. 744.

California.—People v. Egan, 116 Cal. 287, 48 Pac. 120.

Colorado.—Adams v. People, 25 Colo. 532.

Indiana.—Todd v. State, 31 Ind. 516.

Iowa.—State v. McPherson, 9 Iowa, 53.

Louisiana.—State v. Parker, 42 La. Ann. 972, 8 So. 473.

Massachusetts.—Commonwealth v. Curran, 119 Mass. 206.

Michigan.—People v. Paguin, 74 Mich. 34, 41 N. W. 852.

**Mississippi.**—Clive v. State, 78 Miss. 661, 29 So. 516.

Missouri.—State v. Jones, 106 Mo. 302, 17 S. W. 366; Missouri v. Ames, 10 Mo. 743; State v. Palmer, 4 Mo. 453.

cided that where an offense may be committed by doing any one of several things the indictment may, in a single count, group them together and charge the defendant to have committed them all and a conviction may be had on proof of the commission of any one of the things, without proof of the commission of the others.<sup>59</sup> is declared in this connection that substantive acts which and themselves many inofnot be unlawful, but which made are so by when done in a particular manner, or from particular The expletives only give criminal character to that act, and whether one, or more are used, the act remains single, and the penalty the same. If, by increasing the number of expletives, the legal character of the substantive act were changed or penalty increased, there might be some foundation for the assertion, that more than one offense was charged. 60 So where a statute makes two or more distinct acts committed with the same transaction indictable, each one of which may be considered as representing a phase in the same offense, the different acts may be coupled in one count and it is not regarded as duplicity thus

Nebraska.—Aiken v. State, 41 Neb. 263, 59 N. W. 888.

New Jersey.—Farrell v. State, 54 N. J. L. 416, 24 Atl. 723.

New York.—People v. Harris, 7 N. Y. Supp. 773.

Ohio.—Watson v. State, 39 Ohio, 123.

Pennsylvania.—Commonwealth v. Mentzer, 162 Pa. 646, 29 Atl. 720.

South Carolina.—State v. Smalls, 11 Shand. (S. C.) 262; State v. Anderson, 3 Rich. (S. C.) 172.

Texas.—Segars v. State, 35 Tex. Cr. 45.

**Utah.**—People v. Hill, 3 Utah, 334, 3 Pac. 75.

Vermont.—State v. Morton, 27 Vt. 310.

Wisconsin.—Byrne v. State, 12 Wis. 519.

An indictment charging the forgery of a deed and of the acknowledgment thereof charges but one offense. Bennett v. State, 62 Ark. 516.

Goods obtained from one person by the same false pretense, twice repeated on different days, constitute only one transaction, and is not a case for election. Beasley v. State, 59 Ala. 20.

59. Bork v. People, 91 N. Y. 13.

It is never necessary for the people to prove all the allegations in the indictment if those which are supported by the evidence constitute the crime charged therein. People v. Everest, 51 Hun (N. Y.), 19, 26, 3 N. Y. Supp. 612, 20 N. Y. St. Rep. 456.

60. State v. Burgess, 40 Me. 594, per RICE, J.

to join successive statutory phases of the same offense.61 is well settled 61a rule and is supported numerous other decisions.62 So an indictment which, one count charges the crime of selling liquor on Sunday, and, in another, the crime of offering and exposing it for sale on Sunday, the description of the date, place, persons and goods sold or offered for sale, being identical in each count, is held not to charge two crimes, but different aspects of the single crime described by statute.63 Since it is a rule that such acts may be charged in a single count without rendering the indictment defective for duplicity it naturally follows that an indictment is not defective in which there is a joinder in different counts of such acts.64 So an indictment for forgery in the first degree is held in New York not to be subject to objection by reason of the fact that in several counts following the first count, the same crime is charged in different forms, all based upon the same alleged forged deed. 65 And where one was indicted for forgery,

61. Commonwealth v. Hall, 23 Penn. St. 104.

of law that when a statute enunciates a series of acts, either of which separately or all together may constitute the offense, all of such acts may be charged in a single count, for the reason that notwithstanding each act may by itself, constitute the offense, all of them together do no more, and likewise constitute but one and the same offense. People v. Gusti, 113 Cal. 177, 45 Pac. 263; People v. Harrold, 84 Cal. 568, 24 Pac. 106; Flohr v. Territory, 14 Okla. 477, 486, 78 Pac. 565.

**62.** California.—People v. Tyler, 35 Cal. 553; People v. Frank, 28 Cal. 507; People v. Shotwell, 27 Cal. 94.

Massachusetts.—Commonwealth v. Coleman, 184 Mass. 198, 68 N. E. 220.

New Jersey.—State v. Hill (N. J. L. 1906), 62 Atl. 936.

New York.—People v. Harris, 7 N. Y. Supp. 773.

**Pennsylvania.**—Commonwealth v. Soler, 15 Pa. Super. Ct. 520.

**63**. People v. Haren, 35 Misc. 590, 72 N. Y. S. 205, N. Y. Laws 1896, c. 112, § 31.

**64. Iowa.**—State v. Trusty, 122 Iowa, 82, 97 N. W. 989.

Louisiana.—State v. Scott, 48 La. Ann. 293, 19 So. 141.

Missouri.—State v. Williams, 191 Mo. 205, 90 S. W. 448.

New Hampshire.—State v. Lincoln, 49 N. H. 464.

New York.—People v. Adler, 140 N. Y. 331, 35 N. E. 644.

Pennsylvania.—Commonwealth v. Carson, 166 Pa. St. 179, 30 Atl. 985.

Texas.—Flynn v. State (Tex. Cr. 1904), 83 S. W. 206.

65. People v. Alderdice (N. Y. App. Div. 1907), 105 N. Y. Supp. 395.

and the indictment set out an instrument purporting to be a formal statement of an account for services to a county, with the affidavit of the claimant as required by law and the plaintiff in error demurred to each of the counts for duplicity, insisting that the bill or account, the signature to the affidavit, and the signature to the jurat or certificate, were different instruments within the meaning of the statute and that the forgery of each of them was a distinct offense, it was held that the demurrer was properly overruled and that the account and signatures were not separate instruments as they were all essential to the completion of account before it could be properly presented supervisors.66 And where in charging the the board of offense several acts are stated as part of the same transaction it is proper to refuse to compel an election between the counts.67

§ 400. Different means or manner of committing offense—Single count.—Where an offense charged may be committed by two different means, its commission by both means may be charged in one count of an indictment, and proof of either will sustain the allegation.<sup>68</sup> In such a case it is said that proof that any

**66**. Rosekrans v. People, 3 Hun (N. Y.), 287, 5 T. and C. 467.

67. State v. Williams, 191 Mo. 205, 90 S. W. 448.

**68. United States.**—Bridgeman v. United States, 140 Fed. 577; United States v. Watkins, 3 Cranch C. Ct. 545; United States v. Gordan, 22 Fed. 250.

**Georgia.**—Heath v. State, 91 Ga. 126, 16 S. E. 657.

Iowa.—State v. Blair, 92 Iowa, 28, 60 N. W. 486.

**Kansas.**—State v. Heives, 60 Kan. 765, 57 Pac. 959.

Louisiana.—State v. Buford, 52 La. Ann. 539, 26 So. 991. Maine.—State v. Willis, 78 Me. 70, 2 Atl. 848.

Massachusetts.—Commonwealth v. Brown, 80 Mass. 419.

Missouri.—State v. Montgomery, 109 Mo. 645, 19 S. W. 221.

New Jersey.—State v. The Middlesex & Somerset Traction Co., 67 N. J. L. 14, 50 Atl. 354.

New York.—Read v. People of the State of N. Y., 86 N. Y. 381; People of the State of N. Y. v. Davis, 56 N. Y. 951; Taylor v. People, 12 Hun, 212; People v. Everest, 51 Hun, 19, 20 N. Y. St. R. 456, 3 N. Y. Supp. 612.

Ohio.-State v. Frieberg, 49 Ohio

of the means were used proves the offense and that proof that all the means described were used proves no more, the penalty also being the same in each case. 69 So where a statute provides that an offense may be committed in several different ways, one may be charged with the commission of such offense in any one of such ways, or he may be charged conjunctively, in the same count, with having committed the offense in all of the ways enumerated statute. This would only be charging one in the In a case before the United States Supreme Court in fense.70 which this question was raised in construing an indictment for counterfeiting in violation of the Federal statute,71 it was said by Mr. Justice Harlan, "The evil that congress intended to reach was the obtaining of money from the United States by means of fraudulent deeds, powers of attorney, orders, certificates, receipts or other writings. The statute was directed against certain defined modes for accomplishing a general object, and declared that the doing either one of several specified things, each having reference to that object, should be punished by imprisonment at hard labor for a period of not less than five years nor more than ten years, or by imprisonment for not more than five years and a fine of not more than one thousand dollars. We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused, who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will

St. 585, 31 N. E. 881.

Pennsylvania.—Commonwealth v. Hall, 23 Pa. Super. Ct. 104.

Texas.—Reum v. State (Tex. Cr. App.), 90 S. W. 1109; Holman v. State, 90 S. W. 174 (Tex. Cr. App.); Thomas v. State (Tex. Crim. App.), 26 S. W. 724.

Utah.—State v. Carrington, 15 Utah, 480, 50 Pac. 526.

Vermont.—State v. Ferry, 61 Vt. 624, 18 Atl. 451.

69. State v. Haskell, 76 Me. 399.

70. State v. Wester, 67 Kan. 812.

**71**. R. S., § 5421.

be a bar to any further prosecution in respect of any of the matters embraced by it.<sup>72</sup>

§ 401. Same subject continued — Application of rule.—An indictment which in a single count charging the crime of grand larceny alleges that the property was taken by fraud and stealth with not be held insufficient upon an objection to the introduction of testimony upon the ground that the indictment charges two separate and distinct offenses, or that the indictment is uncertain, and fails to charge larceny under the statute, or because the offense is charged to have been committed in the different ways in which the statute designates the same may be accomplished.<sup>73</sup> And an indictment for forgery in the second degree, which, in a single count, alleges that the defendant forged an indorsement on a bank check, with the intent to defraud a person named, and offered the same to such person in payment for goods purchased, is not open to the objection that it charges two distinct crimes, namely, forgery and uttering, it being declerad that the allegation of uttering the check was simply the statement of a fact evidentiary of the intent to defraud essential to constitute the charge of forgery.74 So it has been held that where a murder may have been committed by different means, and it is doubtful which was employed, its commission by all may be charged in one count of the information, and proof of any one will sustain the allegation, but the means so charged in the same count of the information must not be repugnant.75 And although it appears upon the face of the indictment that the acts set forth constitute several modes by which the defendant committed a single breach of the peace, if it also appears from the indictment that the acts, charged were committed at the same time and are parts of the same transaction, the charge is not subject to the obiecion of duplicity.76 And a count in an information was held

<sup>72.</sup> Crain v. United States, 162 U. S. 625, 636, 16 S. Ct. 952, 40 L. Ed. 1097.

<sup>73.</sup> Flohr v. Territory, 14 Okla. 477, 486, 78 Pac. 565.

<sup>74.</sup> People v. Attman, 147 N. Y. 473, 42 N. E. 180.

<sup>75.</sup> State v. Hugh O'Neil, 51 Kan. 651, 33 Pac. 287.

<sup>76.</sup> State v. Matthews, 42 Vt. 547.

not bad for duplicity which charged the defendant with selling and exchanging intoxicating liquors contrary to law.<sup>77</sup>

§ 402. Several counts stating offense - Different ways and means.—In an indictment several counts may be inserted alleging the offense distinctly and separately, in various ways, to meet the evidence, and the court will not compel an election between them on the trial.<sup>78</sup> So in a case in New York where an indictment was objected to on this ground the court said, "It is now objected on behalf of the plaintiff in error that the indictment is fatally defective because it charges two distinst felonies, one under the first section, and one under the third section of the statute. This objection is not well founded. counts are under the same statute, and relate to the same tran-In such a case it matters not that the offense alleged saction. to have been committed is charged in different ways in several counts for the purpose of meeting the evidence that may be adduced. And it matters not that the offence alleged in the different counts are of different grades, and call for different punish-

77. State v. Teahan, 50 Conn. 92. The court said: "The intention of the legislature is plain, which is to prevent the disposition of liquor for consideration. Hence an exchange, as well as a sale, is in terms prohibited. The intention of the pleader is equally plain-to charge one transaction and one only. There is but one time and one place, and we think it was intended to charge but one act; but whether this act was a sale for cash or a sale in a broader sense by way of an exchange, the pleader not knowing alleged that it was both, so that proof of either would sustain the charge." Per CARPENTER, J.

78. United States.—United Statesv. Howell, 65 Fed. 402.

Illinois.—Herman v. People, 131

III. 594, 22 N. E. 471, 9 L. R. A. 182.
 Indiana.—Engleman v. State, 2
 Ind. 91.

Iowa.—State v. Baldwin, 79 Iowa, 714, 45 N. W. 297.

Louisiana.—State v. Clement, 42 La. Ann. 583, 7 So. 685.

Maryland.—State v. Bell, 27 Md. 675.

Massachusetts.—Commonwealthv. Thompson, 159 Mass. 56, 33 N. E. 1111.

New York.—People v. Dimick, 107 N. Y. 13, 14 N. E. 178; People v. Kellogg, 105 App. Div. 505, 94 N. Y. Supp. 617; Lonergan v. People, 6 Park. Cr. R. 209; Nelson v. People, 5 Park. Cr. R. 39; People v. Rice, 13 N. Y. Supp. 161; Kane v. People, 8 Wend. 203.

ments.<sup>79</sup> A count for burglary with an attempt to commit larceny may be united with a count for larceny. So burglary and larceny, rape and an assault with intent to commit rape, larceny and receiving stolen goods, assault with intent to kill, and a simple assault, may be united, and it matters not that the offences thus united, call for different punishments. . . . So long as all the counts relate to the same transaction, as in this case, there can be no objection to the union of such counts in the same indictment."80 And in another case it is decided that it is often necessary to insert in one indictment many counts charging the crime in as many different ways, in order to meet the various phases of the case as developed by the evidence and after a general verdict if one count is sufficient, and others bad, the court will pronounce judgment upon the good count only, and if all are good, judgment will be rendered upon the count charging the highest offense.81 In this connection it is held in New York that

North Carolina.—State v. Howard, 129 N. C. 584, 40 S. E. 71; State v. Barber, 113 N. C. 711, 18 S. E. 575; State v. Harris, 106 N. C. 682, 11 S. E. 377; State v. Morrison, 85 N. C. 561.

Texas.—Hughes v. State (Tex. Cr.), 60 S. W. 562.

West Virginia.—State v. Shores, 31 W. Va. 491, 7 S. E. 413.

Wisconsin.—Newman v. State, 14 Wis. 393.

"The rule is, that although it is not proper to include separate and distinct felonies in different counts of the same indictment, it is proper to state the offense in different ways in as many different counts as the pleader may think necessary. Lyons v. People, 68 Ill. 271. Although it is not proper to include separate and distinct felonies in different counts of the same indictment, it is allowable to state the same offense in different ways, it

being understood that all the counts really relate to one transaction." Kotter v. People, 150 Ill. 441, 37 N. E. 932, per Justice BAKER, citing Bennett v. People, 96 Ill. 602.

A careful solicitor should always frame the indictment with as many counts as may be necessary to meet the different phases of the evidence. Orr v. State, 107 Ala. 37, 18 So. 142.

79. People v. Rynders, 12 Wend. (N. Y.) 425; People v. Baker, 3 Hill, 159; People v. Costello, 1 Denio, 83; Taylor v. People, 12 Hun, 213; Regina v. Trueman, 8 Carr. & P. 727; Wharton's Crim. Law, § 416.

80. Hawker v. The People, 75 N. Y. R. 489. See also People v. Emerson, 53 Hun (N. Y.), 437, wherein the above language is quoted.

**81**. State v. Ward, 61 Vt. 153, 17 Atl. 483.

the provisions of the New York Code of Criminal Procedure 82 abolishing all previously existing forms of pleading in criminal actions and providing that an indictment shall contain "a plain and concise statement of the act constituting the crime, without unnecessary repetition" does not prohibit the charging of the offense in different forms in  $\operatorname{different}$ counts and such indictment subject to is  $\mathbf{not}$ the objection charges one crime.83 But more than an indictment charging two separate and distinct offences, is within the meaning of the New York Code of Criminal Procedure providing that "the crime may be charged in separate counts to have been committed in a different manner or by different means, and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts. 2784

§ 403. Same subject — Application of rules.—In an indictment for murder the death of the murdered person may be laid in several counts as having been occasioned in different and inconsistent modes.<sup>85</sup> So where an indictment contains several counts,

82. §§ 273, 275.

83. People v. Rugg, 98 N. Y. 537. The court said, "Nor is there any ground for the claim that the indictment charges more than one crime. Although it contains different counts, it merely states the commission of the same offense in different forms, so as to meet the evidence which might be presented upon the trial. As there was no direct proof, by an eye-witness of the commission of the offense charged, and as it was connected with the commission of other crimes, it was entirely competent for the pleader to allege in different counts such facts as might, by possibility, be presented upon the trial, and as the proof as to these could not be anticipated with exactness, such

allegations were proper and within the provisions of the Criminal Code. There is nothing in these provisions which compels the pleader to confine the indictment to a single statement of the facts where the proof is uncertain. The object of the pleading is to inform the defendant of the crime alleged against him, and when this is done, without needless repetition, it cannot be urged that he has not been fully advised of the character of the crime for which he is indicted. Per MILLER, J. This case is followed in People v. Menken, 36 Hun (N. Y.), 90.

84. People v. Harmon, 49 Hun (N. Y.), 558, see also People v. O'Donnell, 46 Hun (N. Y.), 358.

85. Smith v. Commonwealth, 21

each charging the murder of the same person, but in a different manner, the State cannot be compelled to elect between such And where in one count of an information for murder the accused was charged with having purposely, and of his deliberate and premeditated malice, killed the deceased, and in two other counts the killing was alleged to have been done in an attempt to rob the deceased it was held, to charge but one offense, and a motion to require the State to elect between the several counts of the information was held to be properly overruled.87 And where an indictment for murder contained four counts and in the first, the mortal wound was charged to have been given with a dagger; in the second with a dirk, made of iron and steel; in the third, with a knife; and in the fourth with a dirk knife, and there was also in the different counts a variation in the description of the injury charged to have been inflicted and there was verdict guilty on the four counts, it was held, that the four counts charged but one offence, and that the verdict was good, the mode of death being substantially the same.88. Again in an indictment charging the use of the mails to defraud, allegations in each count respecting the artifices that were designed to give one understanding of the scheme to one class of people and another understanding to another class, neither class being given the true meaning and each class being deceived and defrauded by the same artifices do not make out two separate schemes to defraud, but a single

Gratt. (Va.) 809. The court said:
"It is a well-settled principle of
criminal pleading and practice, that
several modes of death, inconsistent
with each other, may be set out in
the same indictment. This grows out
of the very necessity of the case.
The indictment is but the charge or
accusation made by the grand jury
with as much certainty and precision
as the evidence before them will warrant. In many cases the mode of
death is uncertain, while the homicide is beyond question. Every
cautious pleader, therefore, will in-

sert as many counts as will be necessary to provide for every possible contingency in the evidence. If the mode of death is uncertain, he may and ought to state it in different counts, in every possible form to correspond with the evidence at the trial as to the mode of death." Per Christian, J.

Merrick v. State, 63 Ind. 327.
 Harry Hill v. State of Nebraska, 42 Neb. 503, 60 N. W. 916;

Furst v. State, 31 Neb. 403.

88. Donnelly v. State, 26 N. J. L. 464.

scheme calculated to entice in either view and such an indictment is not bad for duplicity.<sup>89</sup>

§ 404. Different offenses resulting from same act.—It is a general rule that when two or more offenses result from the same criminal act or transaction such offenses may be charged in different counts without rendering the indictment defective for deplicity. It must be conceded that when two or more offenses arise from a single act or transaction, or are closely related, they may be joined in one count. And if two or more offenses

89. Gourdain v. United States, 154 Fed. 453 (C. C. A.).

90. United States.—United States v. MacAndrews & Forbes, 149 Fed. 823.

**Alabama.**—Grimes v. State, 105 Ala. 86, 17 So. 184.

Arkansas.—Baker v. State, 4 Ark. 56.

Illinois.—Thompson v. People, 125 Ill. 256, 17 N. E. 749.

Indiana.—McCullough v. State, 132 Ind. 427, 31 N. E. Ill6.

Iowa.—State v. Trusty, 122 Iowa, 82, 97 N. W. 989.

**Kansas.**—State v. Blakesly, 43 Kan. 250, 23 Pac. 570.

Louisiana.—State v. Young, 104 La. 201, 28 So. 984; State v. Cook, 42 La. Ann. 860, 7 So. 64.

Maine.—State v. Porter, 26 Me. 201.

Michigan.—People v. Summers, 115 Mich. 538, 73 N. W. 818.

**Nebraska.**—Blodgett v. State, 50 Neb. 121, 69 N. W. 751.

New Hampshire.—State v. Lincoln, 49 N. H. 464.

New York.—People v. Wilson, 151 N. Y. 403, 45 N. E. 862; People v. Davis, 56 N. Y. 95; People v. Trainer, 57 App. Div. 422, 68 N. Y. Supp. 263, 15 N. Y. Cr. Rep. 333; People v. Callahan, 29 Hun, 580; People v. Rose, 39 N. Y. St. R. 291; People v. Kelly, 3 N. Y. Cr. R. 272; People v. Crotty, 9 N. Y. Supp. 437.

Pennsylvania.—Commonwealth v. Church, 17 Pa. Super. Ct. 39.

Rhode Island.—State v. Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.

South Carolina.—State v. Nelson, 14 Rich. L. 169.

**Texas.**—Martinez v. State (Tex. Cr. 1907), 103 S. W. 930.

**Utah.**—State v. Carrington, 15 Utah, 480, 50 Pac. 526.

Virginia.—Speere v. Commonwealth, 17 Gratt. 570.

It must be conceded that when two or more offenses arise from a single act or transaction, or are closely related, they may be joined in one count. Commonwealth v. Hall, 23 Pa. Super. Ct. 104.

91. Commonwealth v. Hall, 23 Pa. Super. Ct. 104.

In New York the effect of the provision of section 279 of the Code of Criminal Procedure that "where the acts complained of may consti-

from part of one transaction, and are of such a nature that a defendant may be guilty of both or all the prosecution will not, as a general rule, be put to an election. The right of demanding an election, and the limitation of the prosecution to one offense, is confined to charges which are actually distinct from each other, and do not form parts of one and the same transaction. Election between counts cannot be required on the ground that distinct offenses are charged where they are committed by the same acts at the same time and the same testimony must be relied on for conviction. 93

§ 405. Same subject — Application of rule — Joinder of counts for larceny and other offenses.—Robbery and larceny of the same articles of personal property from the same person and at the same time and place may be charged in different counts in the indictment, one count charging the taking to have been by violence and the other without. And there may be a joinder of counts for burglary and larceny. And where counts for larceny and obtaining the same goods by burglary are joined it is

tute different crimes such crimes may be charged in separate counts," constituting an exception to the provision of section 278, that "the indictment must charge but one crime," is to permit a continuance of the former practice of joining different crimes by separate counts when they are related to the same transaction. People v. Wilson, 151 N. Y. 403, 45 N. E. 862, aff'g 7 App. Div. 326. The language of § 279 of New York Code Crim. Proc. when properly construed means simply that where two or more offenses of the same nature are based upon the same or a continuous set of facts, either of which offenses makes the accused guilty of the same crime, they may be charged in separate counts in the same indictment.

People v. O'Malley, 52 App. Div. (N. Y.) 47. Under these provisions of the Code an indictment is proper which sets forth in separate counts two or more offenses of the same nature, based upon the same or a continuous set of facts either of which offenses makes the accused guilty of the same crime. People v. Adler, 140 N. Y. 331, 35 N. E. 644.

92. Herman v. People, 131 III. 594, 602, 22 N. E. 471; Goodhue v. People, 94 III. 51; Miller v. State (Neb. 1907), 111 N. W. 637.

93. People v. Sweeney, 55 Mich. 586, 22 N. W. 50.

**94.** People v. Callahan, 29 Hun (N. Y.), 580.

95. Alabama.—Bowen v. State, 106 Ala. 178, 17 So. 335.

decided that it is not necessary that it should affirmatively appear in the indictment, or either count thereof, that the goods obtained by the burglary are the same goods mentioned as being the subject of the larceny. It is sufficient, when the indictment is assailed, that the contrary does not affirmatively appear. In England it was also held in an early case that it was proper to join in the indictment a count for feloniously stealing property, with a count for feloniously receiving the same or any part thereof, knowing it to have been stolen. And it has been generally decided that an indictment may properly charge larceny in one count and the receiving of stolen goods in another and in such a case the State will not be required to elect on which count it will proceed. So the receiving and concealing of a specified stolen article may be distinct acts yet they are necessarily parts

Arkansas.—Baker v. State, 4 Ark. 56.

Colo. 155, 21 Pac. 1120, 4 L. R. A. 803

Indiana.—McCullough v. State, 132 Ind. 427, 31 N. E. 1116.

Missouri.—State v. Moore, 121 Mo. 514, 26 S. W. 345.

**Pennsylvania.**—Shutte's Appeal, 130 Pa. St. 272, 18 Atl. 635; Commonwealth v. Church, 17 Pa. Super. Ct. 37.

South Carolina.—State v. Nelson, 14 Rich. L. 169.

But see State v. Smith, 2 N. D. 515, 52 N. W. 320.

**96.** McCallaugh v. State, 132 Ind. 428, 31 N. E. 1116.

97. People v. Wilson, 151 N. Y. 403, 45 N. E. 862, citing Reg. v. Beeton, 2 C. & K. 960.

98. Alabama.—Orr v. State, 107 Ala. 35, 18 So. 142.

Georgia — Johnson v. State, 61 Ga. 212.

Illinois.—Andrews v. People, 117 Ill. 195, 7 N. E. 265; Bennett v. People, 96 Ill. 602.

Indiana.—Goodman v. State, 141 Ind. 35, 39 N. E. 939; Kennegan v. State, 120 Ind. 176, 21 N. E. 917.

**Kansas.**—State v. Blakesly, **43** Kan. 250, 23 Pac. 570.

Kentucky.—Upton v. Commonwealth, 14 Ky. Law Rep. 165, 19 S. W. 744; Sanderson v. Commonwealth, 11 Ky. Law Rep. 341, 12 S. W. 136.

Maine.—State v. Simpson, 45 Me. 608.

Missouri.—State v. Richmond, 186 Mo. 71, 84 S. W. 880; State v. Gray, 37 Mo. 464.

New York.—People v. Baker, 3 Hill, 159.

North Carolina.—State v. Speight, 69 N. C. 72.

Tennessee.—Hampton v. State, 8 Humph. 69.

Virginia.—Dowdy v. Commonwealth, 9 Gratt. 727.

of the same transaction.<sup>99</sup> Again separate counts for burglary, larceny and receiving stolen goods respectively may be joined in the same indictment when they are all founded upon the same transaction and the acts charged relate to the same property.<sup>1</sup> And counts for larceny and embezzlement may be joined in the same indictment; and where they relate to the same transaction it is not error to refuse to compel the prosecutor to elect upon which count he would proceed.<sup>2</sup>

- § 406. Same subject Further application of rule.—Counts for embezzlement and for obtaining the same money by false pretenses may be joined in the same indictment where they relate to the same transaction.<sup>3</sup> And an indictment may charge in separate counts the forging by defendant of a written instrument set forth, and the uttering on the same date and at the same place of such instrument.<sup>4</sup> So an information may charge, in different counts the obtaining of a note by false pretenses, and a conspiracy to commit that crime, founded on the same transaction.<sup>5</sup> A charge of malpractice against an attorney and counselor at law may also be joined with a prosecution for a contempt of court where both charges involve a single transaction.<sup>6</sup> This rule has also been frequently applied in the case of indictments for procuring an
- 99. Keefer v. The State, 4 Ind. 246. The court said: "By the statute, the nature of the crime and the punishment are the same. The fact of his being charged with two acts, which together make up and are but parts of the same transaction, could not mislead or embarrass the defendant in making his defense."
- 1. People v. Wilson, 151 N. Y. Rep. 403, 45 N. E. 862, aff'g 7 App. Div. 326. See also Thompson v. People, 125 Ill. 256, 17 N. E. 749; People v. Rose, 39 N. Y. St. R. 291; State v. Woodard, 38 S. C. 353, 17 S. E. 135. But see People v. Kerns,

- 7 App. Div. (N. Y.) 535, 40 N. Y. Supp. 243.
  - 2. State v. Porter, 26 Mo. 201.
  - 3. State v. Lincoln, 49 N. H. 464.
- 4. People v. Adler, 140 N. Y. 331, 35 N. E. 644; see also Baker v. State, 4 Ark. 56; State v. Zimmerman, 47 Kan. 242, 27 Pac. 999; Johnson v. Commonwealth, 12 Ky. Law. Rep. 442, 14 S. W. 492; State v. Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.
- People v. Summers, 115 Mich.
   73 N. W. 818.
- Blodgett v. State, 50 Neb. 121,
   N. W. 751.

abortion and miscarriage.7 And it is also applicable where an indictment charges in separate counts the offense of kidnapping and also the offense of abducting a female for the purpose of prostitution.8 Likewise, an indictment containing two counts, one of which charges the defendant with rape and the other with carnal knowledge of a female under a certain age, is not demurrable for duplicity, since there is but one unlawful act charged, and the indictment is thus framed to meet the different phases in which the evidence might present the offense.9 And an indictment in two counts, the first charging the crime of rape committed upon a child under the age of fifteen years, and the second charging the same crime upon the same person, who is alleged to be naturally imbecile, is not had for duplicity, and the State cannot be required to elect upon which count it will proceed to trial.10 And it is also held that one may be charged in the same count with rape and bastardy, 11 and with keeping and knowingly permitting his house to be kept as a disorderly house, 12 and likewise an indictment may charge in different counts the offense of keeping a room for gambling purposes and that of allowing a room or table to be used for such purposes.<sup>13</sup> And the offenses of theft and of illegally branding and marking an animal may be joined in different counts.14 Again, there may be a joinder in an indictment of the charges of doing an act with the intent of committing a certain offense and of the actual commission of such offense. 15

- 7. People v. Davis, 56 N. Y. 95; State v. Carrington, 15 Utah, 480, 50 Pac. 526.
- Mason v. State, 29 Tex. App. 24,
   S. W. 71.
- Grimes v. State, 105 Ala. 86, 17
   184; State v. Houx, 109 Mo. 654,
   S. W. 35. See also Jackson v. State, 91 Wis. 253, 64 N. W. 838.
- 10. State v. Trusty, 122 Iowa, 82, 97 N. W. 989.
- 11. Commonwealth v. Lewis, 140 Pa. St. 561, 21 Atl. 501.
- 12. Willis v. State, 34 Tex. Cr. 148, 29 S. W. 787.

- 13. People v. Trainer, 57 App. Div. (N. Y.) 422, 68 N. Y. Supp. 263, 15 N. Y. Cr. Rep. 333, decided under New York Code Cr. Proc., § 279.
- 14. Welhausen v. State, 30 Tex.App. 263, 18 S. W. 300.
- 15. Alabama.—Walker v. State, 97 Ala. 85, 12 So. 83.

California.—People v. De la Guerra, 31 Cal. 459.

Iowa.—State v. Hull, 83 Iowa, 112, 48 N. W. 917.

Kansas.—State v. Hodges, 45 Kan. 389, 26 Pac. 676, followed in

§ 407. Continuous acts as one offense.—Where an offense consists of several distinct acts, which are in fact to be construed when taken together as one continuous act, such acts may be charged in an indictment without rendering it duplicitous. 16 So under a statute providing that if an officer intrusted by law to collect money for a county shall fail or refuse to pay over all moneys so collected when required, he shall, if the amount equal a specified sum, be punished by confinement in the penitentiary, it has been held that an indictment which charges a clerk of the district court with failure to pay over a large number of jury and witness fees, amounting to several thousand dollars, is not defective as charging a number of offenses in one count, because the fees were collected by him at various times in small amounts, nor because part of it was collected during each of three different appointments under which he acted in discharge of his official And in another case it is held that an information duties.17 which charges that defendant feloniously made, forged and counterfeited a certain bank check, and then and there unlawfully uttered and published it as true, states but one continuous act with reference to the same instrument, and hence is not void for duplicity or on the ground of charging more than one crime. 18

State v. Emmons, 45 Kan. 397, 26 Pac. 679.

Massachusetts.—Commonwealth v. Tack, 20 Pick. 356.

New Hampshire.—State v. Ayer, 23 N. H. 301.

**Tennessee.**—Davis v. State, 3 Caldw. 77.

Virginia.—See Spears v. Commonwealth, 17 Gratt. 570.

United States.—United States
 Byrne, 44 Fed. 188.

Colorado.—Adams v. People, 25 Colo. 532, 55 Pac. 806.

Connecticut.—State v. Falk, 66 Conn. 250, 33 Atl. 913.

Iowa.—Zumhoff v. State, 4 G. Greene, 526.

Kansas.—State v. Kornstett, 62 Kan. 221, 61 Pac. 805.

Kentucky.—Louisville & Jefferson Ferry Co. v. Commonwealth, 104 Ky. 726, 47 S. W. 877; Commonwealth v. Duff, 87 Ky. 586, 9 S. W. 816, 10 Ky. Law R. 617.

Massachusetts.—Commonwealth v. Dunn, 111 Mass. 426.

Washington.—State v. Newton, 29 Wash. 373, 70 Pac. 31.

17. Adams v. People, 25 Colo. 532, 55 Pac. 806.

18. State v. Newton, 29 Wash. 373, 70 Pac. 31.

Again, where one was indicted for the offense of retailing intoxicating liquors by the glass or dram in violation of law, it was decided that the charging that the defendant had retailed twenty glasses or drams to divers persons at divers times did not present more than one offense. So, in a case in Iowa, it is decided that an information charging that defendant "did unlawfully sell beer to persons unknown," is in effect to charge one sale to several persons jointly, and hence, not bad for duplicity under an ordinance making each separate act of selling an offense. And an indictment under the statute which charges the keeping and maintaining of a tenement for the illegal sale and keeping of intoxicating liquors on a certain day "and on divers other days and times between that day and the day of the finding of this indictment" is not bad for duplicity. So in the case of a complaint for cruelty to animals in which one count charged the defendant

19. Zumhoff v. State, 4 G. Greene (Iowa), 526. The court said, after referring to the provision of the Code that an indictment must present but one public offense: "The offense presented by the indictment in the case is no departure from the above section. It charges but one public offense, and that is 'the retailing of intoxicating liquors by the dram.' It matters not whether the defendant retailed one or twenty drams, the offense is still the same and in violation of the same section of the Code. In the one case a mild penalty would be called for and in the other a heavier fine, or both fine and imprisonment according to the extent and flagitious character of the offense. If long continued and under atrocious circumstances, the severest penalty of the law should be enforced. The indictment in this case alleges the offense to have been committed as a continuous traffic 'on divers occasions, to divers persons,' and still it presents only the one offense; the retail of 'intoxicating liquors by the dram.' The offense charged is of a continuous character, carried on from day to day, and although the unlawful traffic is alleged to have been continued for several days or weeks prior to the commencement of the prosecution, it must still be regarded as but the one offense, made the more enormous by its long continuance, and requiring the more exemplary punishment." Per Greene, J. See also State v. Stinson, 17 Me. 154.

Alleging a sale on a day certain and divers other days does not vitiate as charging more than one offense. State v. Kobe, 26 Minn. 148; Osgood v. People, 39 N. Y. 449; People v. Adams, 17 Wend. (N. Y.) 475.

20. State v. King, 37 Iowa, 462.

21. Commonwealth v. Dunn, 111 Mass. 426.

with overworking certain oxen from the first to the fourteenth day of a certain month and another count charged him with neglecting to provide them with proper food and shelter for the same time, it was held that each count charged but a single offense, and properly charged it as a continuing one.<sup>22</sup>

§ 408. Same subject continued.—Where several acts are charged and each act is a distinct offense, and not one of a series of acts forming a part of a single transaction, it has been decided that it is reversible error to overrule a motion to compel the State to elect on which transaction it would rely.<sup>23</sup> So, where on each day on which an act is done is under the statute a separate offense, is committed, a series of such acts should not be charged in one count as a continuing offense, and where this is done it is proper for the court to sustain a motion to quash the indictment or information.24 So it has been decided that an information is bad for duplicity which charges in a single count that on a certain date and divers days between that and a subsequent date, the defendant did publicly and privately open, set on foot and carry on a lottery, where, under the statute creating and defining the offense, each day the lottery is carried on constitutes a separate and distinct crime.<sup>25</sup> And where a statute forbid the sale of cotton futures and provided that "each day such business is carried on or kept shall constitute a separate offense," it was held that an indictment thereunder which charged in one count that the accused did on a day stated "and on each succeeding day thereafter" until another specified date, "conduct, carry on and transact a business, commonly known as dealing in futures in cot-

22. State v. Bosworth, 54 Conn. 1, 4 Atl. 248, wherein it is said: "The gist of the offense is cruelty to animals. That may consist of over-working, under-feeding, or depriving of proper protection, or all these elements may combine and constitute the offense. But aside from this, all offenses involving continuous action,

and which may be continued from day to day, may be so alleged." Per CAR-PENTER, J.

23. State v. Jamison, 110 Iowa, 337, 81 N. W. 594.

24. State v. Dennison, 60 Neb. 192, 82 N. W. 628.

25. State v. Dennison, 60 Neb. 192, 82 N. W. 628, citing State v. Pischel,

ton," was bad for duplicity.<sup>26</sup> And it has been decided that an indictment for incest, charging the criminal act to have been committed continuously through a specified period of years, is to be regarded as charging several distinct offenses, and to be bad for duplicity.<sup>27</sup>

16 Neb. 490; Smith v. State, 32 Neb. 105; Wendell v. State, 46 Neb. 823, 65 N. W. 884; Barnhouse v. State, 31 Ohio St. 39; State v. Temple, 38 Vt. 37; People v. Hamilton, 101 Mich. 87, 59 N. W. 401.

26. Scales v. State, 46 Tex. Cr. 296. 81 S. W. 947, 66 L. R. A. 730. The court said: "In this indictment, the separate days are not set out in distinct counts, but it seems that the attempt was here made to charge a separate offense for each day in one count. We believe that the separate occasions should be set out in distinct counts, and the dates and proof should correspond with some degree of particularity, so that in case of conviction or acquittal, appellant might be secure in his right against being placed in jeopardy again for the same offense. In our opinion the indictment is vicious in the respect pointed out. And being so it was not cured by the court confining the prosecution to one day."

27. Barnhouse, 31 Ohio St. 39. This indictment was upon a statute providing that "if any brother and sister, being of the age of sixteen years or upward, shall have sexual intercourse together, having knowledge of their consanguinity," they shall be deemed guilty of a misdemeanor. The court said: "A single act of sexual intercourse, where the other conditions exist, is all that is

required under the statute to complete the offense. The indictment therefore in the present case, can only be regarded as charging a series of offenses committed within the period specified in the indictment." Per White, J.

See also State v. Temple, 38 Vt. 37, wherein the court says in this connec-"Charging in one count a series of distinct offenses, each meriting a separate penalty or punishment, with a continuando or as committed at divers days and times between certain dates is certainly not in accordance with the general principles of criminal pleading, and we are referred to no authority showing that it is permitted in offenses of this kind, or in any analogous cases. As adultery and incest are not criminal by the municipal laws of England, and have not been for about two hundred years, no precedents of indictments for these particular offenses can be expected to be found in the English books. Nor has any case been cited, either English or American, of an indictment in this form for several distinct offenses in one count. No satisfactory reason is perceived why this case should not be subject to the general rule of criminal pleading which forbids putting the accused on trial for a multitude of offenses charged in a single count. The same reason exists for departing from this § 409. Offenses of different degree or grade.—Offenses of the same character, though differing in degree, may be united in the same indictment, and the prisoner tried on both at the same time, and on the trial may be convicted on the one and not on the other.<sup>28</sup> It is often the case that one felony of considerable magnitude may include within itself other offences of less magnitude, and then all may be charged in one count, as, for instance, the

rule in case of an indictment for assault and battery repeated upon the same person as in this case. An indictment for assault and battery on divers days and times covering a period of two years, would certainly be a novelty. The uncertainty and embarrassment in the mind of the respondent as to what he was called on to meet, would be the same in this case as in that. How can it be ascertained after verdict of guilty upon this indictment, of how many offenses the respondent is convicted. true in offenses of this character the evidence might be not positive and direct to the commission of the offense on any certain day or occasion, it might be of a general character embracing a considerable period of time; for instance, the admission of the respondent testified to by Dutton, in this case, that the respondent and the said Amy had been living together as man and wife would be ad-Neither this uncertainty in the proof as to the particular day and occasion when the offense was committed, nor the fact that it necessarily tended to prove more than one offense, would be any objection to the evidence, but it is no reason why the respondent should be put on trial for more than one offense charged in

one count, nor any reason why the offense should not be charged in the indictment with legal certainty as to time and place. We think the count in question regularly should have charged but one offense, and that the law does not warrant the government in putting the respondent on trial for the multitude of offenses therein alleged." Per Peck, J.

28. Alabama.—Henry v. State, 33 Ala. 339.

Arkansas.—Baker v. State, 4 Ark. 56.

Colo. 130, 29 Pac. 805.

Georgia.—Harris v. State (Ga. 1907), 57 S. E. 937; Sims v. State, 110 Ga. 290, 34 S. E. 1020; Lampkin v. State, 87 Ga. 516, 13 S. E. 523; Long v. State, 12 Ga. 293.

**Kansas.**—State v. Pryor, 53 Kan. 657, 37 Pac. 169.

Louisisma.—State v. Parker, 42 La. Ann. 972, 8 So. 473; State v. Smith, 41 La. Ann. 791, 6 So. 623; State v. Stouderman, 6 La. Ann. 286.

Maine.—State v. Hood, 51 Me. 363.

Massachusetts.—Commonwealth v. Clark, 162 Mass. 495, 39 N. E. 280; Commonwealth v. McLaughlin, 12 Cush. 615.

offense of murder in the first degree, the greater offense, may be charged in one count of an indictment or information, although, by so doing several smaller offenses are also charged in the same count. And it is decided that in all cases an offense may be set forth in a single count of an information, although such offence may include the smaller offence, and although an attempt to commit the principal offence.<sup>29</sup> So in a case in Tennessee it is said

Michigan.—People v. Sweeney, 55 Mich. 586, 22 N. W. 50.

Montana.—Territory v. Milroy, 8 Mont. 361, 20 Pac. 650.

New Hampshire.—State v. Gorham, 55 N. H. 163.

New York.—People v. Wright, 136 N. Y. 626, 32 N. E. 629; People v. McCarthy, 110 N. Y. 309, 18 N. E. 128; Hawker v. People, 75 N. Y. 487; People v. Kellogg, 105 App. Div. 505, 94 N. Y. Supp. 617; People v. Trainor, 57 App. Div. 422, 68 N. Y. Supp. 263; People v. Emerson, 53 Hun, 437, 6 N. Y. Supp. 274; compare People v. Van Horne, 8 Barb. 158.

Ohio.—See State v. Inskeep, 49 Ohio St. 228.

Oklahoma.—Berysinger v. Territory, 15 Okla. 386, 82 Pac. 728.

**Pennsylvania.**—Commonwealth v. Lewis, 140 Pa. St. 561, 21 Atl. 501.

**Tennessee.**—Foute v. People, 15 Lea, 715.

Texas.—Reagan v. State, 28 Tex. App. 227, 12 S. W. 601; Akin v. State (Tex. App.), 12 S. W. 1101; Waddell v. State, 1 Tex. App. 720, citing and approving Weathersby v. State, 1 Tex. App. 643.

But see State v. Marcks, 3 N. D. 532, 58 N. W. 25, decided under Dak. Comp. Lans. § 7244, providing that only one offense may be charged in an indictment.

An indictment is good, charging an offense in different ways in several counts but all under the same statute and relating to the same transaction, but it matters not that the offense alleged in one count is of a different grade from that alleged in another, and calls for a different punishment. Hawker v. People, 75 N. Y. 487.

A single count may allege all the circumstances necessary to constitute two different crimes where the offense described is a complicated one, comprehending in itself circumstances each of which is an offense; and a respondent thus charged with a greater offense may be convicted of one of lesser magnitude contained within it. Thus any indictment charging the breaking and entering of a dwelling-house with intent to steal, will sustain a conviction of entering without breaking, with intent to steal. Upon an indictment for assaulting and obstructing an officer in the service of process, a conviction may be had for a single assault and battery. Such indictments are not bad for duplicity. State v. Gorham, 55 N. H. 163; per Foster, J.

29. State v. Hodges, 45 Kan. 390, 26 Pac. 676; per Valentine, J.

in this connection that, "It has long been settled in this State, in accord with authority, that different offences punished by different degrees of severity, differing only in degree, and belonging to the same class of crimes, may be united, and it is not error for the court below to refuse to quash for this reason, or to refuse to compel the prosecutor to elect on which of the charges he would proceed." 30

§ 410. Offenses of different degree or grade—Application of rule.—There may be a joinder in an indictment of counts for murder and manslaughter.<sup>31</sup> So in a case where the first count was for murder and the second for manslaughter, the court said: "As murder includes manslaughter, the second count was unnecessary, though it did not vitiate the indictment. The district attorney was at liberty to proceed to trial upon both counts of the indictment at the same time; and he could not properly be required to elect upon which count he would rely so long as it appeared from the evidence that the two counts related to the same transaction."<sup>32</sup> And where, by statute, there are different degrees of manslaughter, an indictment may contain separate counts, one charging the defendant with manslaughter in the first degree and the other with manslaughter in the second degree.<sup>33</sup> And

**30**. Foute v. State, 15 Lea. (Tenn.) 715.

Henry v. State, 33 Ala. 389;
 Baker v. State, 4 Ark. 56.

32. Kelly v. People, 17 Colo. 130, 29 Pac. 805. Per Mr. Justice Elliott.

33. People v. McCarthy, 110 N. Y. 309, 18 N. E. 128. In this case the indictment in two separate counts charged the defendant with manslaughter in the first degree, committed under different circumstances; in a third count the charge was manslaughter in the second degree by discharging his pistol "in a culpably negligent manner" in the direction of D., the person killed. At the com-

mencement of the trial defendant's counsel asked the court to instruct the district attorney to elect which count he would proceed on, and at the close of the evidence for the prosecution, and again upon all the evidence, that he be directed to elect on which count a conviction was asked. These requests were denied and it was held, no error; that if more than one crime was charged, except as permitted by the Code of Criminal Procedure (§ 279), the only remedy was by demurrer (§§ 324, 331); but that, in any event, such a request is an appeal to the discretion of the court. and a denial of the application canwhere the indictment contained two counts, one charging deliberate and premeditated homicide, the other that defendant killed the deceased without the design to effect death, but while engaged in the attempt to commit another crime, it was held that a refusal of the court on the trial to compel counsel for the prosecution to elect on which count they would proceed was not error.34 fact that an indictment includes a count for assault with intent to murder and one for aiming and pointing a pistol at another is held not to render it so defective that it should be quashed on motion ore tenus.35 Again a count for a felonious assault and a count for the same transaction described as a common assault, may be joined in the same indictment.36 So a count for the statutory offense of assault with intent to do great bodily harm may be joined with one for the common law offense of assault with intent to kill and murder, though the penalties be different, where both are felonies defined by statute, and one includes the other, so that evidence applicable to the greater applies to the less.<sup>37</sup> Robbery by force and robbery by intimidation are also two grades of the same offense, and both grades may be charged in the same count.38 Likewise an indictment for rape may charge the principal offense in one count and an assault with intent to commit such offense in another, and is not subject to demurrer on the ground that two offenses are charged.<sup>39</sup> So it is said that rape necessarily includes an assault and battery, and though in an indictment for an assault with intent to commit a rape it is not necessary to allege or prove a battery, yet a battery may be one of the facts by which the offense is made out, in which case it constitutes a part of the offense, though not essential, and if alleged there is no duplicity.40 And where an indictment contained two

not be successfully assigned as error. 34. People v. Wright, 136 N. Y. 626, 32 N. E. 629.

35. Williams v. State, 72 Ga. 180.

36. Commonwealth v. McLaughlin, 12 Cush. (Mass.) 615.

**37**. People v. Sweeney, **55** Mich. **586**, 22 N. W. **50**.

38. Sampkin v. State, 87 Ga. 524,

13 S. E. 523; Long v. State, 12 Ga. 293.

39. People v. Tyler, 35 Cal. 553; Stephen v. State, 11 Ga. 225; State v. Sutton, 4 Gill. (Md.) 494; Silas Cook v. State, 24 N. J. L. 843.

40. Commonwealth v. Thompson, 116 Mass. 346.

counts, one for rape and the other for assault with intent to commit rape, it was held that a request that the district attorney be required to elect on which count he would proceed was properly denied. And where there were three counts in an indictment, one for rape in the first degree, the second for assault in the second degree, and the third for rape in the second degree, it was held that the district attorney would not be required to elect upon which of the counts he would go to the jury, as he had the right to go upon all the counts. 42

§ 411. Conspiracy to do criminal act and commission of act.—An indictment may charge a conspiracy to commit a criminal act and also the commission of such act in pursuance of the conspiracy without rendering the indictment subject to the objection of duplicity.<sup>43</sup> So there is no misjoinder in an indictment which in one count charges several defendants with conspiracy to commit a larceny and in another count charges the commission of the larceny in pursuance of the conspiracy.<sup>44</sup> And while burglary and conspiracy to commit burglary constitute two distinct offenses, there may be a joinder in separate counts of an indictment where it appears that there is only one criminal transaction involved.<sup>45</sup> Again, where one count of an indictment charged the defendant with accepting a bribe in consideration of his agreement to release certain contraband liquors held by him as constable and another count charged the same offense, and alleged

**41.** People v. Satterlee, 5 Hun (N. Y.), 167.

**42.** People v. Adams, 72 App. Div. (N. Y.) 166, 76 N. Y. Supp. 366.

**43. Illinois.**—Hoyt v. People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239.

Iowa.—State v. Grant, 86 Iowa, 216, 53 N. W. 120.

New York.—People v. Thorn, 21 Misc. R. 130, 47 N. Y. Supp. 46.

**Texas.**—Dill v. State, 35 Tex. Cr. 240, 33 S. W. 126, 60 Am. St. Rep. 37.

Virginia.—Anthony v. Common-

wealth, 88 Va. 847, 14 S. E. 534.

West Virginia.—State v. Grove (W. Va. 1907), 57 S. E. 296.

An indictment cannot be said to charge more than one crime where it alleges a conspiracy to murder resulting in the murder itself as the conspiracy merges in the felony. People v. Thoon, 21 Misc. R. (N. Y.) 130.

**44**. Anthony v. Commonwealth, 88 Va. 847, 14 S. E. 534.

**45**. Dill v. State, 35 Tex. Cr. 240, 33 S. W. 126, 60 Am. St. Rep. 37.

that it was committed by means of an unlawful conspiracy between the defendant and another, but in reference to the crime charged the court declared that, "The two counts in this indictment describe but one transaction, and are intended to charge but one offense," it was held that the indictment was not bad for duplicity, but was simply charging the offense under different forms, to meet the testimony.<sup>46</sup>

§ 412. Charging commission of act and causing of act to be done-Aiding and abetting.-An indictment charging a defendant with the commission of an act and of causing it to be committed is not defective as charging two offenses.<sup>47</sup> So where an information alleged that the defendant unlawfully, maliciously and mischievously did injure and cause to be injured certain property of another it was held that the phrase "injured and caused to be injured" was not objectionable.48 And likewise an indictment charging that the defendant unlawfully and maliciously destroyed and maliciously caused to be destroyed certain property was held not to be objectionable on the ground that it charged two offenses. 49 And in the case of an indictment against an officer of a corporation for altering the corporate books in violation of a statute, it is held that an allegation that the defendant altered and caused to be altered the book in question does not render the indictment subject to the objection that two offenses are charged where there is only one alteration complained of.<sup>50</sup> where an indictment charged that the defendant caused to be set fire to and burned a large amount of combustible material, with the intention to cause a certain described store building to be burned, and did then and there, in the manner and at the time and place aforesaid, set fire to, and cause to be burned, in the night time, the said store building, it was held that the charge as to

<sup>46.</sup> State v. Potts, 78 Iowa, 656, 43 N. W. 534, 5 L. R. A. 814.

<sup>47.</sup> State v. Kuns, 5 Blackf. (Ind.) 314; see People v. Klipfel, 160 N. Y. 371, 54 N. E. 788, 14 N. Y. Cr. R. 169.

<sup>48.</sup> Boswell v. State, 8 Ind. 499.

**<sup>49</sup>**. State v. Kuns, 5 Blackf. (Ind.) 314.

**<sup>50</sup>**. Qualey v. Territory, 8 Ariz. 45, 68 Pac. 546.

the actual burning must be regarded as an allegation of evidence, to be treated as surplusage, and that the indictment was not, therefore, bad for duplicity.<sup>51</sup> So there is no duplicity in an indictment which alleges that the respondent forged and caused to be forged, and aided and assisted in forging-they being the same offense under the statute, and in legal contemplation the same Again, where it is provided by statute that "every person who shall be convicted of having administered, or of having caused and procured to be administered, any poison," etc., shall be punished as therein stated a count in an indictment, which charges that the prisoner did administer, and did cause and procure to be administered, etc., does not charge two distinct offenses and is not subject to the objection of duplicity.<sup>53</sup> held that one who aids and abets in keeping a banking game or banking house, the act being made one by statute with the principal act, may be prosecuted in one count setting out the principal and the acts of aiding and abetting.54

§ 413. Joinder of a felony and misdemeanor.—Where but one transaction is intended to be charged and prosecuted it is held in many jurisdictions that a count charging a misdemeanor may be joined with a count in the same indictment, charging an offense which is ordinarily denominated a felony.<sup>55</sup> So it has been de-

**51**. State v. Hull, 83 Iowa, 112, 48 N. W. 917.

52. State v. Morton, 27 Vt. 310.

**53.** La Beau v. People, 33 How. Prac. (N. Y.) 66.

**54.** State v. Behan, 113 La. 754, 37 So. 714.

55. Arkansas.—State v. Cryer, 20 Ark. 67.

Illinois.—Herman v. People, 131
 Ill. 594, 22 N. E. 471, 9 L. R. A. 182.
 Maryland.—Burk v. State, 2 Har.

& J. 426.

New Hampshire.—49 N. H. 464. New York.—People v. Trainor, 57 App. Div. 422, 68 N. Y. Supp. 263, 15 N. Y. Cr. R. 333.

Ohio.—Barton v. State, 18 Ohio, 121.

**Rhode Island.**—State v. Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766.

South Carolina.—State v. Beckroge, 49 S. C. 484, 27 S. E. 658.

Must be charged in separate counts.—Where the acts complained of "in a criminal prosecution constitute a felony and also a misdemeanor, both the felony and the misdemeanor may be joined in the same indictment.

clared that the better rule is to permit the joinder of counts, whether for felony or for misdemeanor, where one involved criminal transaction is and the same the different the felonies and misdemeanors counts or charged arise from distinct stages in the same offense.56 And in a somewhat recent case in South Carolina it is said that the power to include distinct offenses of different grades -felony on the one hand and misdemeanor on the other hand, has been recognized in that State in a long line of cases.<sup>57</sup> In other cases, however, it is held that a count charging a felony cannot be united with a count charging a misdemeanor.<sup>58</sup> So in a case in which this view is taken it is said that whilst two or more counts, charging the defendant with the same species of felony, may be joined in the same indictment, as well as different counts charging the defendant with misdemeanors, still the indictment is demurrable when it contains two counts—the one charging the defendant with an offense amounting to a felony, and the other charging him with an offense which amounts to a misdemeanor only, and the reason is that it would embarrass the defendant in

provided that they are charged in separate counts. People v. Linhardt, 4 N. Y. Crim. 327.

**56**. Herman v. People, 131 Ill. 602.

57. State v. Beckroge, 49 S. C. 484, 27 S. E. 658. Per Pope, J., citing State v. Nelson, 14 Rich. 172; State v. Scott, 15 S. C. 434; State v. Norton, 28 S. C. 576; State v. Woodard, 38 S. C. 353.

**58. Alabama.**—James v. State, 104 Ala. 20, 16 So. 94.

Georgia.—Doyle v. State, 77 Ga. 513.

Missouri.—Hilderbrand v. State, 5 Mo. 548.

Tennessee.—State v. Freele, 3 Humph. 228.

Texas.—Samuels v. State (Tex. Cr.) 29 S. W. 1079.

There should not be a joinder in one count of a charge of an attempt to commit a felony with a charge of an attempt to commit a misdemeanor. Hogan v. State (Fla. 1905), 39 So. 464.

By the common law, it seems, counts for a felony and misdemeanor cannot be joined in the same indictment; and if improperly joined, the indictment will be bad on demurrer, or on motion in arrest of judgment. In our country some of the States have adhered to this rule; and in others, it has been held that the reason of the rule has no application in this country and consequently the rule has not been observed. State v. Cryer, 20 Ark. 67.

the selection of a jury, for he might be willing that a juror should try him for the one offense and not for the other.<sup>59</sup>

§ 414. Counts at common law and under statute.—There may be a joinder in an indictment of counts at common law and under a statute for offenses which are of the same general character and result from the same criminal act. 60 So it has been decided that counts at common law and under a statute, for the same offense, may be joined; and that, although one be good and the other bad, and there be a verdict equally applicable to both, yet the judgment need not be arrested therefor. 61 So a count for the statutory offense of assault with intent to do great bodily harm may be joined with one for the common law offense of assault with intent to kill and murder, though the penalties be different, where both are felonies defined by statute, and one includes the other, so that the evidence applicable to the greater applies to the less. 62 And the common law offense of keeping a bawdy-house, and the statutory offense of being a common prostitute, or the keeper of a house of prostitution, having no honest employment whereby to maintain "herself," may be joined, in separate counts, in the same indictment. 63 And a count for the larceny of a horse, concluding at common law, may be joined with a count for the statutory offense of receiving the same, and the indictment thus drawn will warrant a general verdict of guilty.64 In this connection it has also been decided that, where an indictment charged a distillery company with permitting its still slops to flow into the waters of a creek, "whereby the said stream of water was rendered foul, noisome, unfit for man or beast, and caused the fish in said stream to die," it was not subject to the objection that it charged two offenses, one the common law offense of maintaining

<sup>59.</sup> Davis v. State, 57 Ga. 67.

<sup>60.</sup> People v. Sweeney, 55 Mich. 586, 22 N. W. 50; State v. Williams, 2 McC. L. (S. C.) 301; State v. Thompson, 2 Strobh. (S. C.) 12.

**<sup>61.</sup>** State v. Posey, 7 Rich. L. (S. C.) 491.

**<sup>62.</sup>** People v. Sweeney, 55 Mich. 586, 22 N. W. 50.

<sup>63.</sup> Wooster v. State, 55 Ala. 217.64. State v. Lawrence, 81 N. C. 523.

a nuisance, and the other the statutory offense of poisoning or polluting a stream of water, whereby fish are sickened and killed.<sup>65</sup>

- § 415. Charging acts stated in disjunctive in statute.—Where a statute enumerates several acts in the disjunctive, which, either together or separately, shall constitute the offense stated therein, an indictment may charge more than one of them in the conjunctive without being duplicitous.<sup>66</sup> It should not, however, charge such acts in the alternative.<sup>67</sup>
- § 416. Offense affecting different articles Different owners.—Where several articles of property are stolen at the same time and place the stealing constitutes but one offense, and an indictment or information for the offense so committed may charge such stealing in one count, setting forth specifically the owner-
- 65. Peacock Distilling Co. v. Commonwealth, 25 Ky. Law Rep. 778, 78 S. W. 893. The court said: "It not infrequently occurs that the same act may constitute, in whole or in part, two or more cases. In that event it is the accusative part of the indictment that determines the offense charged by the commonwealth. This indictment does not go upon the idea that the statute has been violated. It is not a prosecution for a violation of that or any statute, but it is drawn to charge the common law offense of maintaining and suffering a nuisance. The description of the acts constituting the offense states not only the suffering of the filth and slop to accumulate so as to create unhealthful and offensive odors, but that by letting the slops and filth escape into the stream it killed the fish, which decomposing, added to the offensiveness of the other odors. The

gravamen is the creation of unhealthful, noisome, odors, that fish were killed and waters polluted by the slop were only incidents and parts of the main offense. The indictment was not duplex, and the demurrer was properly overruled." Per O'REAB, J.

66. United States.—United Statesv. Stone, 49 Fed. 848.

California.—People v. Gosset, 93 Cal. 641, 29 Pac. 246.

**Kentucky.**—Vowells v. Commonwealth, 84 Ky. 52.

Louisiana.—State v. Stanley, 42 La. Ann. 978, 8 So. 469.

Missouri.—State v. Fitzsimmons, 30 Mo. 236.

**Texas.**—Laroe v. State, 30 Tex. App. 375, 17 S. W. 934.

See also § 382 herein where this question is more fully considered.

67. See § 382 herein.

ship of each article.<sup>68</sup> That the property stolen was owned by different persons does not make the felonious taking separate offenses. If, in point of time and circumstances, the taking was done as a single act, then it is but one offense. 69 Whether the count is double depends on whether it charges more than one larceny and whether there was more than one larceny depends on whether there was more than one taking, and not on the number of articles taken. 70 The particular ownership of the property which is the subject of a larceny does not fall within the definition and is not of the essence of the crime. The gist of the offense consists in feloniously taking the property of another; and neither the legal or the moral quality of the act is at all affected by the fact that the property stolen, instead of being owned by one, or by two or more jointly, is the several property of different persons. The particular ownership of the property is charged in the indictment, not to give character to the act of tak-

**68. Alabama.**—Reed v. State, 88 Ala. 36, 6 So. 840.

**District Columbia.**—Hoiles v. United States, 3 MacA. (D. C.) 370, 36 Am. Rep. 104.

**Georgia.**—Lowe v. State of Georgia, 57 Ga. 171.

Indiana.—Furnace v. State, 153 Ind. 93, 54 N. E. 441.

Iowa.—State v. Larson, 85 Iowa, 659, 52 N. W. 539.

**Kentucky.**—Nichols v. Commonwealth, 78 Ky. 180.

**Maryland.**—State v. Warren, 77 Md. 121, 26 Atl. 500.

Massachusetts.—Bushman v. Commonwealth, 138 Mass. 507.

Michigan.—People v. Johnson, 81 Mich. 573, 45 N. W. 1119.

Missouri.—State v. Wagner, 118 Mo. 626, 24 S. W. 219; State v. Daniels, 32 Mo. 558.

Montana.—State v. Wjelde, 29 Mont. 490, 75 Pac. 87. **Nevada.**—State v. Douglass, 26 Nev. 196, 65 Pac. 802, 22 Am. St. Rep. 685.

New Hampshire.—State v. Merrill, 44 N. H. 624.

**Pennsylvania.**—Fulmer v. Commonwealth, 97 Pa. St. 503; Commonwealth v. Ault, 1 Pa. Super. Ct. 651.

South Carolina.—State v. Holland, 5 Rich. Law (S. C.) 512.

**Texas.**—Wilson v. State, 45 Texas, 76, 23 Am. Rep. 602; Clark v. State, 28 Tex. App. 189, 12 S. W. 729.

Vermont.—State v. Cameron, 40 Vt. 555.

Virginia.—Alexander v. Commonwealth, 90 Va. 809, 20 S. E. 782.

Washington.—Territory v. Heywood, 2 Wash. Ter. 180.

**69**. State v. Larson, 85 Iowa, 659, 52 N. W. 539.

70. Morse v. Richmond, 42 Vt. 539.

ing, but merely by way of description of the particular offense.71 So it has been declared that the stealing of several articles of property at the same time and place undoubtedly constitutes but one offense against the laws, and the circumstance of several ownerships cannot increase or mitigate the nature of the offense. 72 And in a leading case, in which this question is considered, it is said: "Upon principle it would seem clear that the stealing of several articles at the same time, whether belonging to the same person, or to several persons, constituted but one offense. It is but one offense, because the act is one continuous act—the same transaction, and the gist of the offense being the felonious taking of the property, we do not see how the legal quality of the act is in any manner affected by the fact that the property stolen. instead of belonging to one person, is the several property of different persons. The offense is an offense against the public, and the prosecution is conducted, not in the name of the owner of the property, nor in his behalf, but in the name of the State, the primary object being to protect the public against such offenses by the punishment of the offender. And, although it is necessary to set out in the indictment the ownership of the property, this the law requires in order that the prisoner may be informed as to the precise nature of the offense charged against him, and further, to enable him to plead a former conviction or acquittal, in bar of a subsequent prosecution for the same offense. seems clear to us on principle that the taking of several articles of property under such circumstances constitutes but one felony. And this view is fully sustained, not only by the standard elementary books on criminal law, but by the best considered cases."73 Where an offense of this character is charged in separate counts, the State will not be required to elect on which count it will stand.74 So where an indictment for robbery contained three counts, one of which charged the property feloniously taken to be "thirty cents in specie coin of the United States, consisting

**<sup>71</sup>**. Ohio v. Hennessey, 23 Ohio, 347, 13 Am. Rep. 253.

<sup>72.</sup> Lorton v. State, 7 Mo. 55, 37 Am. Dec. 179.

**<sup>73</sup>**. State v. Warren, 77 Md. 122, 26 Atl. 500, 39 Am. State Rep. 401; per ROBINSON, J.

<sup>74.</sup> State v. Douglass, 26 Nev. 196, 65 Pac. 802.

of one piece of the denomination of twenty-five cents and one piece of the denomination of five cents," and the second count charges the property alleged to have been taken as "a bunch of keys of the value of one dollar," and the third count charged that the defendant feloniously took "a knife of the value of seventy-five cents," it was held that there was not presented a case for compelling the State to elect as between the several counts of the indictment, as to which one he would ask for a conviction.<sup>75</sup> Where, however, an indictment or information charges in one count the larceny of different articles belonging to different owners, it should appear that the taking of each article was a part of the same transaction in which the other articles were taken.<sup>76</sup> And in this connection, in a case where there were several counts, in each of which the larceny of the property of a different person was charged, it was said that the court is not bound to assume that they were for one and the same offense, though alleged to have been committed on the same day.77

§ 417. Offense affecting different buildings or properties—Arson.—An offense affecting different buildings or parcels of property, whether owned by the same party or by different parties, may be properly charged either in different counts or in the same count where the injury thereto is a consequence of the same act or acts which are a part of the same transaction. So an indictment charging as a single act the burning of a number of designated dwelling-houses, charges but one offense, and is, therefore, not bad for duplicity. The criminal act is the kindling of the fire with felonious intent to burn the houses specified, and is consummated when the burning is effected; and the fact that the houses did not burn at the same time, and that but one was set on fire, the fire communicating therefrom to the others, does not make the burning of each a separate offense. The same party of party of the same time, and that but one was set on fire, the fire communicating therefrom to the others, does not make the burning of each a separate offense.

ling the fire with the felonious intent to burn the dwelling-houses specified, and was fully consummated when the burning was effected. The firs was not set in any one of the houses specified, but the charge is that the fire was kindled in the shed for the

<sup>75.</sup> Nevill v. State, 138 Ala. 99.

Joslyn v. State, 128 Ind. 160,
 N. E. 492.

<sup>77.</sup> Bushman v. Commonwealth, 138 Mass. 507.

<sup>78.</sup> Woodford v. People, 62 N. Y. 118. The criminal act was in kind-

ment for arson containing four counts, each of which charges the offense in the first degree, but alleging a different house and different ownership, is not liable to demurrer for misjoinder of counts. And two offenses are not charged by an indictment which alleges the burning of a building and of certain specified personal property therein. And where an indictment contained two counts, one for breaking and entering the dwelling-house of another, and another for breaking and entering, at the same time, the storehouse of the same person, it was held on motion to quash, that the indictment was good, and also that the prosecutor would not be required to elect on which count he would proceed to trial.

§ 418. Offense affecting different persons.—Where a criminal act is a single act consummated at one time it may be charged as one offense, though it affects different persons. So where a person by the same act kills two or more persons, an indictment charging such killing in one count will not be bad for duplicity.<sup>82</sup> And likewise an indictment is not defective wherein there is a joinder of counts charging an assault with intent to murder different persons.<sup>83</sup> So in an early case in Alabama it was held that in an indictment against a slave for administering

purpose of burning the houses, and there can be no question that an indictment for burning one house will be sustained by proof of the firing of another with the criminal intent of burning the house specified. Otherwise, a criminal liability for a higher offense could be avoided in most cases. The several houses could not burn at the same instant, nor could they occupy precisely the same place, but the criminal act was single, and the consequences ensued according to the nature of the act. Per Church, Ch. J.

See also State v. Ward, 61 Vt. 153, 17 Atl. 483; Early v. Commonwealth, 86 Va. 921, 11 S. E. 795.

- 79. Miller v. State, 45 Ala. 24.
- **80**. Clue v. State, 78 Miss. 661, 29 So. 516.
- **81**. State v. Shores, 31 W. Va. 492.
- **82. Louisiana.**—State v. Batson, 108 La. 479, 27 So. 639.

Mississippi.—Williamson v. State, 77 Miss. 705, 27 So. 639.

Tennessee.—Forrest v. State, 81 Tenn. 103; Kannon v. State, 10 Lea. 386; Womack v. State, 7 Cold. 508.

**Texas.**—Chivario v. State, 15 Tex. App. 330; Ricker v. State, 7 Tex. App. 549; Cornell v. State, 104 Wis. 527, 80 N. W. 745.

83. Tanner v. State, 92 Ala. 1, 9 So. 613.

poison to white persons, a count was not demurrable for duplicity which charged that the defendant "did administer to, and cause to be administered to and taken by" three certain free white persons, "a large quantity of arsenic."84 And it is held in this connection that where two or more persons are killed by the same act, the State cannot indict the guilty party for killing one of the persons and after a conviction or acquittal indict him for killing the other.85 Again, an indictment for embezzlement by an officer of a corporation, which charged that he embezzled money of the corporation, and also that he embezzled money of persons other than the corporation, was held not to be duplicitious, on the ground that it charged two offenses when, under the statute under which the indictment was framed, the distinguishing feature of the crime of embezzlement were that the official should have come into possession of the property converted by reason of the confidence and trust reposed in him by virtue of his position, and that he should have converted such property fraudulently.86 And likewise an indictment charging a person with assault upon two or more persons, in one count, where such assault is committed at the same time and by one act and with the same intent, is not objectionable as charging two offenses in one count as such an assault constitutes but one offense.87 And a count in such an indictment charging the sale of divers quantities of different sorts of liquors, to divers citizens of the State and to divers persons unknown, cannot be objected to on error as a count embracing more than one offense; the whole will be deemed a single transaction.88

84. Ben v. State, 22 Ala. 9, 58 Am. Dec. 234.

85. Clun v. State, 42 Ind. 421.

86. Taylor v. Commonwealth, 25Ky. L. R. 374, 75 S. W. 244.

87. Kansas.—State v. Johnson, 70 Kan. 861, 79 Pac. 732.

Massachusetts.—Commonwealth v. Chamberlain, 107 Mass. 209.

Michigan.—People v. Ellsworth, 90 Mich. 442, 51 N. W. 531.

New York.—People v. Rockhill, 74 Hun, 241.

Rhode Island.—Kenney v. State, 5 R. I. 385.

**Tennessee.**—Fowler v. State, 3 Heisk. 154.

**Texas.**—Scott v. State, 46 Tex. Cr. 305, 81 S. W. 950.

88. People v. Adams, 17 Wend. (N. Y.) 475; see also Stoss v. State, 3

§ 419. Different description of person affected.—One whose person or property is affected by the criminal act of another may in many cases be differently described in different counts in order to meet the evidence in the case. So an indictment for the embezzlement of one sum of money at one time may, in different counts, charge that the money embezzled was the property of different persons.89 And an indictment for murder may contain two or more counts, in each of which the person alleged to have been murdered may be described by a different name. 90 Nor is it any objection to an indictment for larceny, which contains two counts, that in each of the counts the property alleged to have been stolen is alleged to have belonged to a different person.91 So where an indictment contains several counts, one for larceny, others for receiving stolen goods knowing them to have been stolen, and others for aiding another person to conceal stolen goods, knowing them to have been stolen, but the charges in all the counts, however, relate to the same goods, which in different counts are laid to be the goods of different persons, or of a person unknown, it is held that it is not a case in which the court should quash some of the counts, or compel the prosecution to elect on which count the prisoner shall be tried.92

§ 420. Where description of offense includes another offense.—If the description of one offense when complete necessarily implies or includes another, there is no repugnancy created which renders their joinder in the same count improper.<sup>93</sup> And as a general rule the fact that in describing an offense a part of the facts stated are descriptive of another offense does not render the indictment subject to the objection that it charges two offenses.<sup>94</sup>

Mo. 9; Endleman v. United States, 86 Fed. R. 456.

89. Myers v. State, 4 Ohio C. C. 570.

90. State v. Smith, 24 W. Va. 814.

**91.** Crittenden v. State, 134 Ala. 145, 32 So. 273; Kennedy v. State, 31 Fla. 428, 12 So. 858.

92. Dowdy v. Commonwealth, 9 Gratt. (Va.) 727.

93. State v. Randle, 41 Tex. 292.

94. United States.—United States v. Hausee, 79 Fed. 303.

California.—People v. Ah Oun, 39 Cal. 604.

Iowa.—State v. Edmunds, 127 Iowa, 333, 101 N. W. 431.

Kentucky.—Peacock Distillery Co. v. Commonwealth, 25 Ky. Law Rep. 1778, 78 S. W. 893; Farris v. So in Massachusetts it is said "That allegations of facts connected with the particular offense intended to be charged, and showing that another offense was committed at the same time and by the same acts as set forth, do not necessarily amount to duplicity of pleading, is established by various decisions of this court." So the fact that in stating the manner or means of the commission of an offense another offense is stated by name does not render an indictment duplicitous. And an indictment for forgery is not bad for duplicity in charging the forgery of a bank check and signature, it being intended merely by alleging the forgery of the signature to set out the manner in which the check was forged. And two distinct offenses are not charged by an

Commonwealth, 12 Ky. Law Rep. 592, 14 S. W. 681; Commonwealth v. Powell, 8 Bush. 7.

Louisiana.—State v. Desroche, 47 La. Ann. 651, 17 So. 209; State v. McTier, 45 La. Ann. 440, 12 So. 516.

Massachusetts.—Commonwealth v. Holmes, 165 Mass. 457, 43 N. E. 189; Commonwealth v. Hart, 10 Gray, 465.

Missouri.—State v. Knock, 142 Mo. 515, 44 S. W. 235; State v. Gilmore, 110 Mo. 1, 19 S. W. 218.

New Jersey.—State v. Middlesex & Somerset Traction Co., 67 N. J. L. 14, 50 Atl. 354; Farrell v. State, 54 N. J. L. 416, 24 Atl. 723.

New York.—Polinsky v. People, 73 N. Y. 65.

North Carolina.—State v. Harris, 106 N. C. 682, 11 S. E. 377.

Ohio.—Blair v. State, 5 Ohio C. C. 496.

Tennessee.—Cornell v. State, 66 Tenn. 520.

Wisconsin.—McKinney v. State, 25 Wis. 378.

Compare State v. Mattison, 13 N.

D. 391, 100 N. W. 1091, holding that where in charging a single offense in an information matters of aggravation are unnecessarily alleged which fully describe another offense not necessarily included in the one attempted to be charged, the information is bad for duplicity.

As to a conviction of an offense in any degree inferior to that charged in the indictment, see Dedieu v. People, 22 N. Y. 178.

95. Commonwealth v. Thompson, 116 Mass. 346. Per Wells, J., citing Commonwealth v. Eaton, 15 Pick. (Mass.) 273; Commonwealth Twitchell, 4 Cush. (Mass.) 74; Commonwealth v. Tuck, 20 Pick. (Mass.) 356; Commonwealth v. Hope, 22 Pick. 1; Commonwealth Nichols, 10 Allen (Mass.), 199; Commonwealth v. Harris, 13 Allen (Mass.), 534.

96. Moline v. State, 72 Neb. 361, 100 N. W. 810; State v. Ferry, 61 Vt. 625, 18 Atl. 451.

97. Barnes v. Commonwealth, 101 Ky. 556, 41 S. W. 772.

indictment alleging that the respondents made an assault upon a person, attempting thereby by intimidations to procure such person to avoid voting at an annual town meeting.<sup>98</sup>

- § 421. Unnecessary averments Surplusage. Though an indictment may contain a more elaborate and specific statement of the facts than is necessary, the defendant cannot on this account alone demur thereto on the ground that it charges more than one crime, 99 as such unnecessary matter may be treated as surplusage. 1 So an indictment for disturbing religious worship "by talking and laughing" and by indecent gestures, is not bad for duplicity. It charges but one offense, the words "by talking and laughing" being mere surplusage.2 And in an indictment for selling on Sunday intoxicating liquor, to be drank on the premises where sold, an averment that the defendant had no license or permit authorizing him so to do does not render the indictment objectionable for duplicity, but such averment is merely surplusage.3 And in an indictment for fraudulently obtaining the signature of the prosecutor to a promissory note, a count charging the fraudulent obtaining of the signature is not defective because the actual payment of the note was therein afterwards alleged; the allegation of payment being held not a statement of another offense, but simply surplusage, which could be
- 98. The assault set forth in the indictment is not alleged as a substantive offense, but as a specific statement of the manner in which the respondents attempted to prevent Butler from voting. The gist of the offense laid is the attempt, and the assault is alleged merely to describe "the act, which, in combination with the intent, is signified by the word of compound meaning, 'attempt.'" State v. Josiah Hardy & als., 47 N. H. 538. Per Smith, J.
- 99. People v. Wicks, 11 App. Div. (N. Y.) 539, 42 N. Y. Supp. 630.

See also Traylor v. State, 101 Ind. 65; State v. Palmer, 35 Me. 9.

1. State v. Rapley, 60 Ark. 13, 28 S. W. 508; Hatfield v. State, 9 Ind. App. 296, 36 N. E. 664; State v. Comings, 54 Minn. 359, 56 N. W. 50; State v. Adams, 108 Mo. 208, 18 S. W. 1000; State v. Armstrong, 106 Mo. 395, 16 S. W. 604.

Compare State v. Mattison, 13 N. D. 391, 100 N. W. 1091.

- State v. Bledsoe, 47 Ark. 233, 1
   W. 149.
  - 3. State v. Hutzell, 53 Ind. 160.

stricken out by the court on motion.4 Again, where an indictment charged that the defendant "feloniously, willfully and for his own gain did buy and receive" a certain stolen mule, it was held that it did not charge two offenses, as the addition of the word "received," though not necessary, did not make the offense less or different from buying the property stolen.<sup>5</sup> Likewise where a statute forbid the sale of "adulterated milk or milk to which water or any foreign substance has been added," an indictment thereunder was held not to be bad for duplicity in that it charged that the defendant sold a certain quantity of "adulterated milk, to which a large quantity, that is to say, four quarts, of water had been added."6 And an indictment which alleged that the defendant did "embezzle, steal, take and carry away" certain goods was held not bad as charging the two offenses of embezzlement and larceny, and that the word "embezzle" would be rejected as surplusage and the indictment be regarded as charging a larceny only.7 But words in an indictment which may have been the grounds of the verdict cannot be rejected as surplusage to support a conviction.8

§ 422. Imperfect description of another offense — Surplusage.—Where an indictment, in charging an offense, states facts which insufficiently describe another offense, the latter statements do not vitiate the indictment, but may be rejected as surplusage. So it is said in this connection, in a case in which this

- 4. Commonwealth v. Frey, 50 Pa. St. 245.
  - 5. People v. Montejo, 18 Cal. 38.
- 6. Commonwealth v. Farren, 9 Allen (Mass.), 489.
- 7. Commonwealth v. Simpson, 9 Metc. (Mass.) 138.
  - 8. Ellis v. Ellis, 11 Mass. 92.
- Maine.—State v. Haskell, 76
   Me. 401.

Massachusetts.—Commonwealth v. Stowell, 9 Metc. 569.

Minnesota.—State v. Comings, 54

Minn. 359, 56 N. W. 50; State v. Henn, 39 Minn. 464, 476, 40 N. W. 564.

Missouri.—State v. Flanders, 118 Mo. 227, 23 S. W. 1086.

New York.—People v. Casey, 72 N. Y. 393; Lohman v. People, 1 N. Y. 379, 2 Barb. 216.

North Carolina.—State v. Darden, 117 N. C. 697, 23 S. E. 106.

Pennsylvania.—Jillard v. Commonwealth, 26 Pa. St. 169; State v. Gould, 26 W. Va. 258.

"The accused could not have been subquestion was raised: jected to any additional danger on account of the defective averments in the count, upon which they were found guilty. They were of no importance, and their insertion does not render the count bad for duplicity for it does not contain a description of two different offenses. It contains a description of one offense and some additional averments not describing any other offense. To constitute duplicity two offenses must be sufficiently de-So an indictment is not bad for duplicity which conscribed."10 tains the necessary averments charging an aggravated assault and which also details the facts necessary to make the offense of threatening to take life, but omitting to charge that such threat was seriously made.11 And an affidavit charging a violation of a statute prohibiting during such days and hours when the sales of intoxicating liquors are unlawful, the maintaining of screens obstructing the view of a room in which such liquors are sold, is not bad for duplicity because it contains some, though not all, of the averments necessary to charge an offense under another and different statute.<sup>12</sup> Again, where two sections of a criminal statute are intended, in a general way, to cover the same offense, or different degrees of the same offense, but the offense defined in either is not included in the other, an information which fairly charges an offense under one of such sections is not open to the charge of duplicity because some of the language used is similar to that found in the other section. 13

§ 423. Joinder of parties — Generally.—Where more persons than one engage in the doing of a criminal act, in such a way as to make each one guilty of the crime, they may be jointly indicted, either in a single count or in separate counts. So two or more

10. State v. Parmer, 35 Me. 13.

Two offenses must be set out sufficiently to render an indictment double. State v. Henn, 39 Minn. 464, 40 N. W. 564.

- 11. Crow v. State, 41 Tex. 468.
- 12. Herron v. State, 17 Ind. App.

161, 46 N. E. 540; determining sufficiency of an affidavit alleging violation of § 4, Act of March 11, 1895.

13. State v. Appleby, 66 Kan. 351,71 Pac. 847.

14. District of Columbia.—Ainsworth v. United States, 21 Wash.

persons may be jointly indicted where the same evidence as to the act which constitutes the crime applies to them all. So in an early English case it is said that several defendants may be joined in one count of the same indictment or information, if the offense wholly arises from such a joint act as is criminal in itself, without regard to any personal default of the defendant, which is peculiar to himself. And it has been decided that several offenders may, in some cases, be included in the one indictment for different offenses which are of the same nature, in which case the word separately should be inserted, which has the effect of making the indictment several as to each of the offenders. Where an indictment is so framed, however, it may be quashed by the court in its discretion if it appears that any material disadvantage will arise from so preferring the charge. It is, however, a

Law R. 806, 1 App. D. C. 518.

La. 737, 30 So. 101.

Minnesota.—State v. Johnson, 37 Minn. 493, 35 N. W. 373.

Missouri.—State v. Gay, 10 Mo. 440.

New Hampshire.—State v. Forcier, 65 N. H. 42, 17 Atl. 577.

**New York.**—People v. Coombs, 36 App. Div. 284, 55 N. Y. Supp. 276.

Ohio.—Hess v. State, 5 Ohio, 5.

**Pennsylvania.**—Commonwealth v. Gillespie, 7 Serg. & R. 439.

South Carolina.—State v. Woodard, 38 S. C. 353, 17 S. E. 135.

Texas.—Lewellen v. State, 18 Tex. 538.

Virginia.—Anthony v. Commonwealth, 88 Va. 847, 14 S. E. 834; Hash v. Commonwealth, 88 Va. 172, 13 S. E. 398.

Sufficiency of joint indictment for murder.—A joint indictment against two persons charging that they "on the — day of ——. 1896, before the finding of this indictment, did wilfully, feloniously and with malice aforethought, kill and murder Pearl Bryan, by the one or the other, . . . with a knife or other sharp instrument, cutting the throat of the said Pearl Bryan, so that she did then and there die, the other being then and there present, aiding and abetting the same, the exact manner whereof is unknown to the grand jurors; and which did the cutting . . . or which aided and abetted the same, is unknown to the jurors," is held sufficiently direct and certain as to the party charged; they each being charged with the murder, either by the cutting or by aiding or abetting the other. Jackson v. Commonwealth, 100 Ky. 239, 38 S. W. 422.

15. Commonwealth v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398.

16. Rex v. Benfield, 2 Burr. 980.

17. Lewellen v. State, 18 Tex. 538. See also State v. Vail, 19 Ark. 563; Commonwealth v. Gillespie, 7 Serg. & R. (Pa.) 469. general rule that where the offense is of such a character that it cannot be committed by two or more persons jointly, it is error in an indictment to charge several persons jointly with the commission of such an offense. Nor should persons be jointly charged in an indictment with the commission of offenses which are distinct and independent and not of the same nature. So it has been held that two persons can not be jointly indicted for the statutory offense of the use of "abusive, insulting or obscene language" in the presence of a female. So two defendants cannot be jointly indicted in the same count for uttering vulgar or profane language, or making violent threats against another, at his residence. And an indictment charging two persons with betting on the result of an election and a third with becoming the stakeholder of such bet, has been held defective, the offenses being separate and distinct crimes.

§ 424. Necessity of joinder of parties.—The State may determine whether it will proceed against defendants accused of the commission of a single crime, either jointly, with the privi-

18. Cox v. State, 76 Ala. 66; State v. Wainwright, 60 Ark. 280, 29 S. W. 981; State v. Deaton, 92 N. C. 788.

19. Townsend v. State, 137 Ala. 91, 34 So. 382; Elliott v. Smith, 26 Ala. 78; State v. Hall, 97 N. C. 474, 1 S. E. 683; State v. Nichols, 12 Rich. L. (S. C.) 673.

20. Cox v. State, 76 Ala. 66. The court said in this case: "It would seem that, ex vi terminorum, this offense can scarcely be committed by two or more persons conjointly. It is made up of speech—perverted speech—which is necessarily a personal, individual act; and if two should employ the same abusive or obscene language, it would seem this could not amount to a joint act. Each might be guilty, but we can not

perceive how the guilt could be joint. Possibly one might procure another to use language interdicted by the statute; and possibly such offense, so procured to be committed, would present a case of joint criminality. That is not this case. There is neither proof, nor ground for inference, that either of these defendants procured the other to use the language the testimony tends to show was uttered by that other. No joint offense was shown, and, under our rulings, it was error to indict them jointly, as having participated in the commission of one and the same misdemeanor," Per STONE, C. J. See also State v. Raulstone, 3 Sund. (Tenn.) 107.

21. State v. Lancaster, 36 Ark. 56.

lege to each of them of securing a separate trial, or separately.23 And a defendant cannot avail himself by plea in abatement or otherwise of the fact that others were employed with him in the identical offense of which he is indicted, who are not embraced the indictment.24 So an indictment, charging that the defendant and another "did commit an affray, by fighting together by mutual and common consent, in public view," includes a charge of mutual assault and battery, and the defendant may be convicted under it, though the grand jury endorsed not a true bill as to the other.25 And an act providing that all persons engaged in the same offense shall be embraced in the same indictment has been held to be directory and one to be pursued if practicable, but to be no matter of defense to one of several codefendants who is indicted alone.26 So where, by statute, it is intended that when two or more persons are charged before the grand jury with the joint commission of a crime, in preferring a bill they shall find it against all who are charged, and not indict one and let the others go free, so that they will be at liberty to appear and testify in the interest of their confederate, yet the fact that one is not included in the indictment with the defendant named works no injury to him and the indictment will not be held invalid on that account.27 Where, however, a single individual, unconnected with others, cannot commit the offense intended in an indictment, it is not sufficient in an indictment to charge the commission of such offense by an individual.28

§ 425. Effect of joinder of parties.—Offenses, though committed jointly, are said to be in law several, and a charge that two persons committed a crime is equivalent to a charge that each

23. People v. Plyler, 121 Cal. 162.

A joint prosecution is not essential except as to offenses which cannot be committed by a single person. People v. Lange, 56 Mich. 549, 23 N. W. 217.

24. State v. Davis, 2 Sneed. (Tenn.) 273.

25. State v. Wilson, 61 N. C. 237.

<sup>26.</sup> State v. Davis, 2 Sneed. (Tenn.) 273.

<sup>27.</sup> State v. Steptoe, 65 Mo. 640.

<sup>28.</sup> State v. Fox, 15 Vt. 22, holding that an indictment against an individual, unconnected with others, for aught that was averred, predicated upon that section of the statute relative to offenses against public

committed it.<sup>29</sup> So in a case where two persons were indicted jointly it was declared that "while it may be said that each of them committed the act, yet it is also true that both committed the act; so that the act and the indictment may be regarded as both several and joint."<sup>30</sup> And in a case in Pennsylvania it is decided that upon an indictment charging four with riot, and a riotous assault and battery, one may be convicted of an assault and battery, and the others acquitted generally.<sup>31</sup> Again, where the acts of the prisoners committing the offense are a part of one and the same transaction, and the offense in law admits of different degrees, they may be convicted of different degrees, though jointly indicted for the same offense.<sup>32</sup> And this rule is said to generally apply except in those cases of indictments for offenses necessarily joint, such as conspiracy or riot.<sup>33</sup>

§ 426. Who may be joined as defendants.—Several members of a legislative body may be jointly indicted for the making of a

policy which inflicts a penalty upon each individual of any company of players or persons whatever, who shall exhibit any tragedies, etc., is insufficient.

29. State v. Wadsworth, 30 Conn. 55; State v. O'Brien, 18 R. I. 105, 25 Atl. 916; Brown v. State, 5 Yerg. (Tenn.) 367.

"It is a well established principle in all cases, civil as well as criminal, that a charge in tort against two is several as well as joint, against all and each of them. All or part may be convicted, and all or part may be acquitted." Commonwealth v. Brown, 12 Gray (Mass.), 135.

Right to a severance.—Where two are indicted for an offense, one as principal in the first degree, and the other as principal in the second degree, the court may refuse the application of the latter for a severance in the trial, if no other cause be shown for a severance than the affidavit of the party, that he is not guilty, and that he believes he cannot have a fair and impartial trial, if tried jointly with the other. Mask v. State, 32 Miss. 406.

**30.** State v. Winstandley, 151 Ind. 316, 51 N. E. 92.

31. Shouse v. Commonwealth, 5 Pa. St. 83.

32. Klein v. People, 31 N. Y. 229, holding that where two are jointly indicted for committing a larceny, and one of them pleads guilty of an attempt to commit a larceny, and is sentenced, the other defendant may be lawfully tried for the larceny, and, on conviction, be sentenced to suffer the penalty of the law therefor.

33. Klein v. People, 31 N. Y. 229.

corrupt agreement to vote in a certain way.<sup>34</sup> And where persons occupy the position of police commissioners, their duty being a joint one, they may be jointly indicted for a neglect to perform such duty.<sup>35</sup> There may also be a joinder in the same indictment in

34. State v. Lehman, 182 Mo. 424, 81 S. W. 1118, 103 Am. St. Rep. 670, 66 L. R. A. 490. The court said: "The offense charged is the making of the corrupt agreement that they would vote in favor of the pending measure, and this question is narrowed down to this proposition: That is to say, these defendants, all members of the same department of the city government, the duties resting upon each being identical, if they jointly make a corrupt agreement to vote for a measure pending, or that may be brought before them, must the State charge them separately by indictment or information with making such agreement, or may they be charged jointly with the commission It may be that the of that act? joint corrupt agreement may result in the commission of separate and distinct offenses by all those who participated in the making of it, but the acts which resulted in the commission of the distinct offenses were joint, and the proof of the guilt of one who participated in the making of such agreement would necessarily prove the guilt of the others who were parties to it. In other words, their crimes may be distinct; but their acts, which resulted in the commission of the crime, are While it may be said that each member of the House of Delegates charged with this offense, in contemplation of

law, made the corrupt agreement, yet such distinct agreement, so contemplated, results from the joint act of all the defendants in making the joint corrupt agreement. It was one transaction, the same subject matter, the same purposes were designed to be accomplished, the performance of the same functions rested upon all alike, and we are of the opinion that if is in harmony with the objects and purposes of good pleading, as well as with the spirit of the statute, to present the issue made by this charge, to all who are interested, by joining them in one indictment. The principle upon which this conclusion is reached finds support both by the text writers and adjudicated cases." State v. Lehman, 182 Mo. 448, 81 S. W. 1118, 103 Am. St. Rep. 670, 66 L. R. A. 490.

35. State v. Castle (N. J. L. 1907), 66 Atl. 1059. The court said: "The next objection is that the defendants are jointly indicted when the neglect of each is necessarily a separate offense. This is not the fact. The neglect charged is of the public duty of the defendants as police commissioners. That duty is a joint duty, which cannot be exercised by any one of them alone, and the neglect is likewise joint. Each defendant must indeed concur in the neglect, but the result is a joint result." Per Swayze, J.

different counts of an individual and a corporation as defendants where the subject matter of the offense is of the same nature and admits of the same plea and the same judgment.36 And in an indictment under the Sherman Anti-Trust Law against corporations there may be a joinder of their presidents as defendants.37 Again, two persons may commit an assault and battery each upon the other, at the same time, and though each would be guilty of a distinct and several offense, yet it is decided that the offenses, being misdemeanors, and of the same nature, the offenders may be joined in the same indictment if severally charged. In such a case, however, it is further said that the court has the discretion to quash the indictment.38 And where two commit a joint assault with intent to murder, the one with a knife and the other with a gun, a count in the indictment, which charges them jointly, is not objectionable for duplicity.39 Parties to the crime

36. State v. Atchison, Lea (Tenn.), 729. The court said: "It is true the corporation may not be imprisoned, but the fact that the same measure of punishment cannot be inflicted in this way cannot vitiate the indictment, the judgment is of the same character, that is, a fine and costs. That imprisonment might possibly be inflicted in one case and not in the other, cannot in the least affect the validity of the indictment. The principle of such an objection is that joinder of different offenses might embarrass the parties in their defense. The fact that one could not be imprisoned after conviction, certainly can have no influence in the conduct of the trial on the question of guilty or not guilty." Per FRE-MAN, J.

37. United States v. MacAndrews & Forbes Co., 149 Fed. 823.

38. State v. Lonon, 19 Ark. 577.

39. Shaw v. State, 18 Ala. 547,

wherein the court said: "The third objection, that the first count is bad for duplicity, in charging two offenses, cannot be supported. The two defendants are jointly indicted for a joint assault made by them, the one employing as the instrument, with which he attempted to kill and murder, a knife, the other a loaded gun. but both engaged in the same assault with a common intent, namely, feloniously, wilfully, and of their malice aforethought, to kill and murder. Hawkins, in treating of the indictment says, it seems certain at this day that notwithstanding the offense of several persons cannot but in all cases be several, because the offense of one man cannot be the offense of another, but every one must answer severally for his own crime, yet if it wholly arise from any such joint act which in itself is criminal, without any regard to any particular personal default of the defendant, the

of adultery may also be jointly indicted. 40 And it has been decided that two or more persons may be jointly indicted as principals for the commission of rape.41 And it is no misjoinder to charge in the same indictment, either in one or in several counts, one person with breaking and entering a building and stealing therein and another person with receiving the goods stolen. 42 Again, where two persons join in an affidavit for a continuance, signing the affidavit together, being sworn together, and one certificate of oath being attached, such persons may be indicted Two or more persons may also be jointly charged, in the same indictment, with the offense of selling spirituous liquor, without license,44 but it is decided that there should be no joinder in the absence of proof showing a common design or concert of action.45 An indictment for the offense of playing a game of cards at a public place, in violation of statute, should only join therein those persons who participated in the same game. 46

## § 427. Joinder of husband and wife.—A husband and wife

indictment may either charge the defendant jointly and severally, or may charge them jointly only, without charging them severally; because it sufficiently appears from construction of law that if they joined in such act, they could but be each of them guilty; for the law looks upon the charges as several against each, although the words of it purport only a joint charge against all. 3 Hawk. Pleader, 331, § 89." Per Chilton, J.

- **40**. Commonwealth v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398.
- 41. Dennis v. State, 5 Ark. 230, wherein it is said: "Where several persons join in the commission of a crime of any aggravated character, such as treason, murder, rape, and the like, and all present, aiding and abetting, the law holds them to be

principals in the offense, and equally guilty. They may be jointly or separately indicted at common law; for while they are all being guilty as joint perpetrators, they are equally guilty as separate offenders. No injustice can flow from either mode of proceeding. Upon joint indictments, the defendants will be entitled to separate trials, if they show a good cause for such severance." Per LACY, J.

- 42. Commonwealth v. Darling, 129 Mass. 112.
- **43**. State v. Winstandley, 151 Ind. 316, 51 N. E. 92.
- 44. Commonwealth v. Sloan, 4 Cush. (Mass.) 52; Commonwealth v. Harris, 7 Gratt. (Va.) 600.
  - 45. State v. Edwards, 60 Mo. 490.
  - 46. Lindsey v. State, 48 Ala. 169.

may be jointly indicted, and, upon sufficient proof, both convicted.<sup>47</sup> So it is declared in a case in New York that "when the husband is guilty of the offense charged, and the wife also, and coercion is shown not to exist, they may be jointly indicted and convicted; for in such a case the wife acts in her own capacity as one able to commit crime, of her own accord and intent, as much so as an unmarried person; and to that effect I think are the authorities." <sup>48</sup> And it is said that prosecutions upon such indictments, have been sustained for keeping a bawdy-house or common gaming house.<sup>49</sup> So a husband and wife may be jointly indicted for keeping a liquor nuisance.<sup>50</sup>

§ 428. Principal and accessory, or aider and abettor — Principals in first and second degree.—An indictment may charge one as principal and another as accessory before the fact.<sup>51</sup> And

47. Commonwealth v. Tryon, 99 Mass. 442.

48. Goldstein v. State, 82 N. Y. 231, 233. Per Danforth, J., citing King v. Chedwick 1 Keble, 585; Rex v. Cross, 1 Raym. 711; Rex v. Stapleton, 1 Crawford & Dix's C. R. 163; State v. Bentz, 11 Mo. 27; King v. Morris, 2 Leach (4th ed.), 1096; Reg. v. Ingraham, 1 Salk. 384.

**49.** Commonwealth v. Tryon, 99 Mass. 442, citing Regina v. Williams, 1 Salk. 384, 10 Mod. 63; King v. Dixon, 10 Mod. 335.

See State v. Bentz, 11 Mo. 27, holding that a wife and her husband may be jointly indicted for keeping a bawdy house.

50. Commonwealth v. Tryon, 99 Mass. 442. The court said, after referring to such indictments for keeping a bawdy house or a common gaming house: "The offense of keeping a common nuisance by maintaining a house used for the illegal sale and

illegal keeping of intoxicating liquors has no peculiarity to distinguish it in this respect, for the wife may take an active part in its management Indeed keeping a house resorted to for purposes of prostitution or illegal gaming might be punished under the very statute on which this indictment is founded, or such resorting might even under proper allegations be given in evidence in the same case as the mode of use charged in the in-Commonwealth v. Davis, 11 Gray (Mass.), 48; Commonwealth v. Taylor, 14 Gray (Mass.), 26. The guilt of the wife might be shown by evidence of her participation in the offense charged by acts done in the absence of her husband and not appearing to have been done by his coercion." Per GRAY, J.

See also Commonwealth v. Murphy, 2 Gray (Mass.), 510.

United States.—United States
 Berry, 96 Fed. 842.

where a person is indicted as an accessory in the same indictment as the principal, but in a separate count, and has a separate trial, the joinder is not prejudicial to the prisoner, and is no ground for quashing the indictment, or arresting the judgment.<sup>52</sup> is said "That a principal felon and an accessory before the fact may be included in the same indictment, with proper charges and averments against each, seems unquestionable. Such was the settled rule of the common law.<sup>53</sup> And such would seem in the nature of things right and proper. They are, in a very proper sense, joint offenders, both concurring, at least in intent, in the crime."54 In misdemeanors there are no accessories, as there are in felonies, but all the guilty actors, whether present or absent at the time the offense was committed, are principals; and should be indicted as such.<sup>55</sup> Again, where an indictment avers the offense against two persons, and then avers that one of them was actually present, aiding, counselling, advising and procuring the said acts, oaths and willful purpose of the other; this does not con-

**Georgia.**—Rawlins v. State, 124 Ga. 31, 62 S. E. 1; Bishop v. State, 118 Ga. 799, 45 S. E. 614.

Massachusetts.—Commonwealth v. Devine, 155 Mass. 224, 29 N. E. 515; Commonwealth v. Mullen, 150 Mass. 394, 23 N. E. 51; Commonwealth v. Adams, 127 Mass. 15; Commonwealth v. Adams, 7 Gray, 43.

**New Hampshire.**—State v. Lang, 65 N. H. 284, 23 Atl. 432.

Ohio.—Hartshorn v. State, 29 Ohio St. 635.

**South Carolina.**—State v. Atkinson, 40 S. C. 363, 18 S. E. 1021.

In an indictment against a principal and accessory the offense alleged to have been committed by the former should first be charged, followed by an averment charging the latter as accessory in proper words. United States v. Berry, 96 Fed. 842.

Commonwealth v. Bradley, 16
 Super. Ct. 561.

53. Citing Bullock v. State, 10 Ga. 47.

**54.** Loyd v. State, 45 Ga. 57, 71. Per McCay, J.

**55.** People v. Erwin, 4 Den. (N. Y.) 130.

In misdemeanors all participants are principals, and may be indicted therefor either separately or jointly. State v. Nowell, 60 N. H. 799.

All participants in a misdemeanor are severally liable, the same as if each had committed the offense alone, and all or any number of them may be charged together in one count of one indictment, or each may be indicted separately at the election of the commonwealth. Shel-

stitute two offenses, but one, in which both are principals.<sup>56</sup> in case of felony, where several are present, aiding and abetting, they may all be joined in the same indictment, and some one of them may be charged as actual perpetrator of the crime, and the others as aiders and abettors; still they will all be held guilty as principals, and punished accordingly.<sup>57</sup> So two defendants who are principals in the same felony may be charged in the same count, though one may be a principal in the first degree, as having actually committed the offense, the other as principal in the second degree, either by reason of being an accessory before the fact or being present, aiding, abetting and inciting his co-defendant in the commission of the crime, though not actually taking part in the criminal act itself, which is the gist of the offense.<sup>58</sup> And one who actually commits a homicide and one who is present, aiding, abetting, encouraging and advising the commission of the act, may be jointly indicted, though it may appear that only one of them actually committed the act of killing, as there is in legal contemplation but one offense of which all or any one of them can be convicted as principals.<sup>59</sup> Again, an indictment against two, which charges one with an assault, with the intent maliciously and feloniously to kill and murder, and the other with having maliciously and feloniously incited his co-defendant to make the assault with that intent, is good at common law.60 And it has been decided that two persons may be jointly indicted, one for maintaining a liquor nuisance and the other for aiding in its maintenance.61 Where, by Code, those who aid and abet the commission of a crime, which, from its nature, could in fact have been committed by but one, are chargeable as principals, such

byville & Eminence T. P. R. Co. v. Commonwealth, 9 Ky. Law R. 244.

56. People v. Martin, 77 App. Div. (N. Y.) 406; See Everett v. State, 33 Fla. 661, 15 So. 543; Cupp v. Commonwealth, 87 Ky. 35, 9 Ky. Law Rep. 877, 7 S. W. 405.

57. Dennus, a Slave, v. State, 5 Ark. 230.

58. Pettes v. Commonwealth, 126 Mass. 242.

59. Hatfield v. Commonwealth, 21 Ky. Law Rep. 1461, 55 S. W. 679.

60. State v. Pile, 5 Ala. 72, wherein the court said that the one charged with inciting his codefendant was not indicted as an accessory but that he was equally guilty as he who was prompted to act and might be punished as a principal with him.

61. State v. Ruby, 68 Me. 543.

persons may be jointly charged in an indictment with such And under a statute providing that no distinction shall exist between an accessory before the fact and a principal, and providing that all persons concerned in the commission of a felony, whether it is the person who committed the act constituting the offense or those who may aid and abet in its commission, shall be indicted, tried and punished as principals, an indictment charging a felony and setting forth that one of the defendants was an accessory before the fact is good.<sup>63</sup> In this connection it is said, in construing an indictment under a statute to this effect, which also provided that "no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal;" "It is true the statute makes an accessory before the fact a principal, and it is wholly unnecessary to charge the accused in any other form than as principal; but, if the grand jury does charge one who is in fact an accessory before the fact as such, the effect is simply to inform him more clearly of what he must defend against, and therefore it is not a defect of which he can be heard to complain."64

<sup>62.</sup> State v. Comstock, 46 Iowa,
64. Territory v. Guthrie, 2 Ida.
245.
432, 435, 17 Pac. 39.

<sup>63.</sup> People v. Cryder, 6 Cal. 23.

# CHAPTER XV.

## CONCLUSION, INDORSEMENTS AND SIGNATURES.

Section 429. Necessity of conclusion—Generally.

- 430. Effect of constitutional provision as to manner of conclusion.
- 431. Same subject-Strictly literal compliance not necessary.
- 432. Same subject-Unnecessary words-Surplusage.
- 433. Necessity of conclusion to each count.
- 434. Same subject—Effect of constitutional provision as to conclusion.
- 435. Necessity of concluding contrary to the form of the statute.
- 436. Where statute merely declaratory of common law.
- 437. Indictment for common law offense—Conclusion contrary to statute—Surplusage.
- 438. Use of word "statutes" or "statute" in conclusion.
- 439. Necessity of indorsement "A true bill."
- 440. Same subject-Contrary view.
- 441. Same subject—Statutory provisions requiring indorsement.
- 442. Indorsement of names of witnesses.
- 443. Indorsement of title of cause.
- 444. Indorsement of name or nature of offense.
- 445. Necessity of signature of foreman of grand jury.
- 446. Signature of foreman-What is sufficient.
- 447. Necessity of signature of public prosecutor.
- 448. Signature of public prosecutors-Who may sign.
- 449. Signature of public prosecutor-What is sufficient.
- § 429. Necessity of conclusion Generally.—In concluding an indictment at common law it was essential that words should be used indicating that the acts committed were an offense against the peace and dignity of the sovereign power in whose name the accusation proceeded. In England the usual words were "against the peace of our Lord the King (or Lady the Queen), his crown and dignity." In this country the words are simply changed to conform to the proper designation of the sovereign power. And it

<sup>1.</sup> Harden v. State, 106 Ga. 387, 32

An indictment for violating S. E. 365.

An indictment for violating the laws of a state against

is declared in an early case that whoever commits an offense indictable either by statute or at common law is guilty of a breach of the peace of that government which exercises jurisdiction for the time being over the place where such offense is committed and that in setting forth the offense, an omission to charge it as having been done against the peace of the government is fatal.2 case, however, in which this question is considered it is said: "The conclusion 'against the peace and dignity of the king' was held in England to be necessary in all indictments. No reason was assigned for it except that it had been customary. nished no light to the defendant, and its employment was not required by any statute. As every criminal offense is in its nature 'against the peace' its use is tautology, and, doubtless, originated in the rhetorical flourish of some ancient and forgotten pleader."3 Where the name of the State is given in the caption of the indictment it is held sufficient if the indictment conclude "against the peace and dignity of the State," without again naming it.4

counterfeiting, properly charges the offense to have been committed against the sovereignty of the people of that state, instead of charging it to have been committed against the sovereignty of the people of the United States. Harlan v. People, 1 Doug. (Mich.) 207.

An indictment in a territorial court for a violation of the laws adopted by Congress for the government of the territory properly concludes "against the peace and dignity of the United States" though it is said that it might be sufficient to conclude "contrary to the statute in such case made and provided." Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452.

2. Damon's Case, 6 Me. 128; see State v. Pemberton, 30 Mo. 376; State v. Lopez, 19 Mo. 254; Wood v. State, 27 Tex. App. 538, 11 S. W. 525; United States v. Crittenden, Hempst. 61.

State v. Kirkman, 104 N. C.
 10 S. E. 312. Per Clark, J.

Any material omission in the conclusion of an indictment is as fatal as if occurring in any other portion of the instrument. State v. Rector, 126 Mo. 328, 23 S. W. 1074.

In England where the words "against the peace of the king" are held material it is considered that their omission is not ground for a motion in arrest of judgment, but the objection must be taken at an earlier stage. State v. Kirkman, 104 N. C. 911, 10 S. E. 312, citing Arch. Cr. Pl. p. 58.

4. Atwell v. State, 63 Ala. 61. See also Commonwealth v. Young, 7 B. Mon. (Ky.) 1.

it is not the office of the conclusion of an indictment to restate the time or place of the commission of the offense.<sup>5</sup> An indictment may also, it is held, be amended to supply a defect caused by the omission of the conclusion.<sup>6</sup> In some States a conclusion is by statute not essential to the sufficiency of an indictment. And where it is provided by statute that an indictment is "sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible and explicit manner and that it shall not be "quashed or judgment arrested" by any mere informality, an omission to conclude an indictment "against the peace and dignity of the State" does not vitiate it.8

§ 430. Effect of constitutional provision as to manner of conclusion.—Where the constitution or statutes of a State provide that an indictment shall conclude in a certain manner compliance therewith is essential.9 So it is said that the authorities seem to be absolutely uniform that when the rule in relation to this particular form in an indictment is expressly provided for by the written law of a State, it must be strictly applied, and the omission of the words thus formally prescribed, either by the constitution or

- 5. State v. Hudspeth, 150 Mo. 12, 51 S. W. 483.
- 6. Cain v. State, 4 Blackf. (Ind.)
- 7. State v. Schelling, 14 Iowa, 455; Commonwealth v. Freelove, 150 Mass. 66, 22 N. E. 435.
- 8. State v. Kirkman, 104 N. C. 911, 10 S. E. 312, approved in State v. Peters, 107 N. C. 876, 12 S. E. 74. See Shiver v. State, 41 Fla. 630, 27 So. 36.
- 9. Alabama.—Cagle (Ala. 1907), 44 So. 381; Smith v. State, 139 Ala. 115, 36 So. 727 ("against the peace and dignity of the state").

Georgia.—Hardin v. State, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep.

269 ("contrary to the laws of said state, the good order, peace and dignity thereof").

Maryland.-State v. Dycer, 85 Md. 246, 36 Atl. 763 ("against the peace, government and dignity of the state").

Missouri.--State v. Pemberton, 30 Mo. 376 ("against the peace and dignity of the state"); State v. Lopez, 19 Mo. 254 ("against the peace and dignity of the state").

Tennessee.—Rice v. Heisk. (Tenn.) 215 ("against the peace and dignity of the state").

Texas.—Cox v. State, 8 Tex. App. 254, 34 Am. Rep. 746 ("against the peace and dignity of the state").

West Virginia.—State v. Mc-

statute of a State is fatal.<sup>10</sup> So where it is provided by the constitution of a State that indictments shall conclude "against the peace and dignity of the State" it is essential to the validity of an indictment that it should so conclude.<sup>11</sup>

§ 431. Same subject — Strictly literal compliance not necessary.—Though the form of the conclusion is prescribed by the constitution of the State, it seems to be a general rule that a strictly literal compliance is not necessary, it being sufficient if the conclusion is the same in substance and within the spirit and meaning of the requirement.<sup>12</sup> So the provision in the constitution requiring all indictments to terminate with the words, "against the peace and dignity of the State," is sufficiently complied with by an indictment concluding "against the peace and dignity of our said State." And where an indictment concluded against the peace and dignity of the same State aforesaid" there was held to be a sufficient compliance with a constitutional provision that an indictment shall conclude "against the peace and dignity of the State." And under a constitutional provision that

Clung, 35 W. Va. 280, 13 S. E. 654 ("against the peace and dignity of the state"); Emons v. State, 4 W. Va. 755, 6 Am. Rep. 293 ("against the peace and dignity of the state of West Virginia").

An indictment which fails to contain the conclusion provided fails to state an offense and will not support a conviction. Cagle v. State (Ala. 1907), 44 So. 381.

An indictment concludes properly if it follows the form prescribed by the statute. Camp v. State, 25 Ga. 689.

An indictment found after the adoption of the constitution for an offense committed before the adoption of that instrument was held to conclude properly "against the peace and dignity of the people of the state of Colorado." Packer v. People, 8 Colo. 361.

10. Hardin v. State, 106 Ga. 387,32 S. E. 365.

11. State v. Cadle, 19 Ark. 613; Anderson v. State, 5 Ark. 444.

12. Washington v. State, 53 Ala. 29; Toney v. People, 17 Ill. 105; State v. Robinson, 27 S. C. 615, 4 S. E. 570; State v. Washington, 1 Bay. (S. C.) 120; State v. Yancey, 1 Treadw. Const. (S. C.) 237.

13. State v. Keau, 10 N. H. 347.

14. State v. Powers, 59 S. C. 200, 37 S. E. 690, the court after referring to the following cases in this state (State v. Washington, 1 Bay. 120;

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all prosecutions shall be carried on "in the name and by the authority of the people of the State of Illinois," and conclude "against the peace and dignity of the same," an indictment has been held sufficient which concludes "against the peace and dignity of the people of the State of Illinois."15 Again, where it was urged as error that each count of the indictment concluded "against the peace and dignity of the People of the State of Illinois," instead of using the term "against the peace and dignity of the same People of the State of Illinois," the court declared that whilst the latter term is that used in the constitution, the omission of the word "same" does not vitiate the indictment.16 But in a case in West Virginia in which this question was raised, the court said "the precise words for the conclusion of all indictments are prescribed in this provision, and the quotation marks, which are superadded, would indicate a purpose that a strict and literal compliance in exact language of the constitution would be required.17

§ 432. Same subject — Unnecessary words — Surplusage.— Where an indictment concludes in the words prescribed by the constitution the fact that such words are followed by other words of conclusion does not vitiate the indictment, as the latter words may be rejected as surplusage. So allegations in the conclusion of an indictment, beyond the words "against the peace, government and dignity of the State," are immaterial, and may be re-

State v. Anthony, 1 McC. 285; State v. Robinson, 27 S. C. 618; State v. Mason, 54 S. C. 240, 32 S. E. 357) said: "None of the cases above cited are rested upon the ground that the provision of the constitution requiring indictments to conclude 'against the peace and dignity of the state,' are to be regarded as directory merely, but they rest upon the ground that where an indictment, in its conclusion, contains all the words required by the constitution, and also contains additional words, which do not change or

obscure the meaning of the required words, such additional words should be regarded as surplusage."

15. Zarresseller v. People, 17 Ill. 101.

16. Kirkham v. People, 170 III. 11, 48 N. E. 465.

17. Emons v. State, 4 W. Va. 755, 6 Am. Rep. 293, per Berkshire, J.

18. State v. Schloss, 93 Mo. 361, 6 S. W. 244. In this case the constitutional words "against the peace and dignity of the state" were followed by the words "and contrary to the jected as surplusage.<sup>19</sup> And in a case in Texas it is decided that the addition of the name of the State after the words "against the peace and dignity of the State" does not vitiate the indictment.<sup>20</sup> And a similar conclusion is reached in Virginia.<sup>21</sup>

§ 433. Necessity of conclusion to each count.—The question whether, where there are several counts in an indictment, a conclusion to each count is necessary is one in respect to which the decisions are conflicting. There are several cases which are authority for the doctrine that where there are several counts in an indictment the fact that the last count contains the usual and correct conclusion does not cure the defect in the first counts caused by the omission of the conclusion.<sup>22</sup> In other cases, however, it is decided that a conclusion to each count is not absolutely essential and that where the last count contains the proper conclusion this applies to the other counts. And this seems to be the rule sup-

form of the statute in such cases made and provided." See State v. Hays, 78 Mo. 600.

19. Richardson v. State, 66 Md. 205, 7 Atl. 43. The court said: "In respect to the conclusion of the indictment, on which stress has been laid by the appellant's counsel, it may be said, that so far as the omission to allege in the conclusion that what had been set forth as published, had redounded to the damage of Judge Fowler, is concerned, it is wholly immaterial; and as to the allegation that it was 'to the great scandal and disgrace of the administration of justice in Baltimore county, and in contempt of the State of Maryland and its laws, and to the evil example of all others in like cases offending" we may add, that they are wholly unnecessary, and may be rejected as surplusage," per IRVING, J.

- 20. State v. Pratt, 44 Tex. 93. The court said: "If the name of the state being added at the end of the sentence was held to vitiate the indictment, it is not perceived on what principle such a ruling could have been made. The name being added neither detracts from nor adds to the sentence, as the state whose peace and dignity are affected by the commission of the offense can possibly be none other than the state of Texas. It is simply useless without being noxious in the indictment." ROBERTS, J.
- 21. Brown v. Commonwealth, 86 Va. 466, 10 S. E. 745. The court said "The indictment concludes 'against the peace and dignity of the commonwealth of Virginia,' the last two words being in addition to the required form prescribed by the constitution. The demurrer, however,

ported by the majority of the decisions.23 So in the United States Supreme Court it is said in reply to an objection that a count of an indictment is defective in that it does not conclude that the offense charged was "contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States," that it is sufficient to say that such allegation, which is one of a mere conclusion of law, is not of the substance of the charge, and the omission is of a matter of form, which does not tend to the prejudice of the defendant.24

§ 434. Same subject — Effect of constitutional provision as to conclusion.—In determining this question it has been decided that a constitutional provision that all indictments shall conclude "against the peace and dignity of the State" requires that each count of an indictment must so conclude, it being declared that each count must be complete in itself, and capable of standing alone if the other counts are quashed.<sup>25</sup> So in Missouri it is decided that each count in an indictment must conclude as required by the constitution or else it is fatally defective, and that if there are two or more counts in an indictment and the last one concludes: properly, but the others do not, the conclusion in the last will not

was overruled, and in this there was no error." Per Servis, J.

22. State v. Cadle, 19 Ark. 613; State v. Soule, 20 Me. 19; Commonwealth v. Carney, 4 Gratt. (Va.) 546.

23. Alabama.-McGuire v. State, 37 Ala. 161.

Louisiana.-State v. Scott, 46 La. Ann. 293, 25 So. 954.

North Carolina.—State v. Beatty, 61 N. C. 52.

Tennessee.—Rice v. State. Heisk. 215.

Texas.—Bink v. State (Tex. Cr. 1906), 98 S. W. 863; Stebbins v. State, 31 Tex. Cr. 294, 20 S. W. 552;

Alexander v. State, 27 Tex. App. 533, 11 S. W. 628.

24. Frisbie v. United States, 157 U. S. 168, 15 Sup. Ct. 586, 39 L. Ed. 657.

25. Williams v. State, 47 Ark. 230, 1 S. W. 149; State v. Strickland, 10 S. C. 191; Early v. Commonwealth, 86 Va. 921, 11 S. E. 795; State v. McClung, 35 W. Va. 280, 13 S. E. 658, wherein it is said: "Each count is as to this point to be regarded a separate indictment, and each must have the conclusion, and the conclusion found in one count, though the last, help or supply the omission in the others.26 In this same case, however, it is said that in Louisiana, Texas and Wisconsin the rule is that a constitutional provision as to the manner in which an indictment shall conclude is satisfied, though there are several counts, where the last count concludes according to the formula prescribed.<sup>27</sup> And in Wisconsin it is declared that where the constitution of the State contains such a provision in case of an indictment with two counts, one against the principal and another against an accessory before the fact, if the latter count contains the said formula, the court would probably be justified (in view of the uselessness of such formula) in holding this a sufficient compliance with the constitution.<sup>28</sup> And a similar doctrine is asserted in a case in Vermont.<sup>29</sup> And in a recent case in Ohio it is decided that where it is provided by the constitution that "all indictments" shall conclude in a certain way, this does not require that each count shall so conclude, and that where there is no statute which requires this it is unnecessary.30 And a similar conclusion is reached in a late case in Mississippi.31 It will be seen from these cases that the authorities are far from being in harmony in

will not cure its absence from another count." Per Brannon, J.

26. State v. Ulrich, 96 Mo. App. 689, 70 S. W. 933, citing State v. Clevenger, 25 Mo. App. 655; State v. Lopez, 19 Mo. 654; State v. Pemberton, 30 Mo. 676; State v. Schloss, 93 Mo. 361. The constitution of Missouri, § 38, art. 6, provides that all indictments shall conclude "against the peace and dignity of the state."

27. State v. Ulrich, 96 Mo. App. 689, 70 S. W. 933, citing State v. Scott, 48 La. Ann. 293; Alexander v. State, 27 Tex. App. 533; Nichols v. State, 35 Wis. 308.

28. Nichols v. State, 35 Wis. 308.

29. State v. Amidon, 58 Vt. 524.

30. Olendorf v. State, 64 Ohio St. 118, 59 N. E. 892. But see Thompson

v. Commonwealth, 20 Gratt. (Va.) 724, wherein it is said: "The court is of opinion that as the constitution requires that indictments shall conclude 'against the peace and dignity of the commonwealth,' and as the first count of the indictment in this case does not so conclude, though the second count does; the first count is therefore fatally defective in that respect, and the demurrer thereto ought to have been sustained instead of overruled." Per Moncure, J.

31. Starling v. State (Miss. 1907), 43 So. 952, wherein the court said: "We are clearly of the opinion that the words 'against the peace and dignity of the State of Mississippi,' are only required to appear, in the language of the constitution, at the con-

their conclusions and that no rule can really be stated as clearly supported by the weight of authority. So far, however, as the cases stand, the weight is slightly in favor of the doctrine that a conclusion to each count is not essential and that a conclusion to the final count is sufficient. In those States, however, where there is no decision supporting such a doctrine, the better and safer practice, in view of the decisions being so much at conflict, would therefore be to have a conclusion to each count.

§ 435. Necessity of concluding contrary to the form of the statute.-Where the statute creates an offense which did not exist at common law the indictment should conclude contra formam statuti.32 So it has been declared that where an offense is created

clusion of the indictment. It is not necessary that they should be repeated after each count. guage of the constitution is: indictments shall conclude against the peace and dignity of the State.' No single count in an indictment containing more than one is the indictment. The indictment is the thing which contains all the counts. There may be many counts, but there can be but one indictment. The bill of indictment, in the language of the law, is a unit, is one complete thing, and it is this bill of indictment to which the constitution has reference in section 169. The bill of indictment in this case did conclude, as the constitution requires, with the words 'against the peace and dignity of the State.' Those words wherever they appear at the conclusion of an indictment, necessarily apply to every count in the indictment before its conclusion, and it would be the merest tautology to repeat them at the end of each count. All that is meant.

when it is said that each count must be complete in itself, is that each count must completely and accurately define the offense, giving all its essential constituent elements. braced in that count; and, whenever a count in an indictment does that, it has perfectly fulfilled its office. The words in this indictment, 'against the peace and dignity of the State,' do not belong to either count, technically considered. They belong to the conclusion of the whole indictment, as the constitution requires."

32. Indiana.—Fuller v. State, 1 Blackf. 63.

Kentucky.--McCullough v. Commonwealth, Hard. 95.

Maine.-Davis v. French, 20 Me.

Maryland.—State v. Negro Jesse Evans, 7 Gill & J. (Md.) 290.

Massachusetts.—Commonwealth v. Cooley, 10 Pick. (Mass.) 37; Commonwealth v. Inhabitants of Springfield, 7 Mass. 9.

New York .- People v. Cook, 2

by statute, or the statute declares a common law offense, committed under peculiar circumstances not necessarily included in the original offense, punishable in a different manner from what it would be without such circumstances; or where the nature of the common law offense is changed by the statute from a lower to a higher, as where a misdemeanor is changed into a felony, the indictment must be drawn with reference to the provisions of the statute, and

Park. Cr. R. 12; Hughes' Case, 4 City Hall Rec. 132.

Pennsylvania.—Warner v. Commonwealth, 1 Pa. St. 154, 44 Am. Dec. 114.

South Carolina.—State v. Mc-Keltrick, 14 S. C. 346; State v. Gray, 14 Rich. L. 174.

England.—Reg. v. Mayor & Corporation of Poole, 57 Law T. N. S. 485.

From the earliest age of the law, it has been conceded, that an indictment concluding contrapacem, charges only a violation of the common law, and with such an indictment, the accused need only refer, when preparing for his defense, to the criminal code of the common law, to ascertain what are the ingredients constituting the offense charged, and what will vindicate or excuse him. If the facts as charged in such indictment, do not constitute the offense by the rules of common law, the party accused need do no more than to show that those rules do not embrace the case made out in the indictment. To sustain a charge so made, by the aid of a statute which prohibits the act imputed as a crime, would be a surprise upon the accused, because the indictment gave him no notice that he was charged with a violation of a statute. State v. Negro Jesse Evans, 7 Gill & J. (Md.) 292; per Chambers, J.

It is settled that indictments given by statute must conclude contra formam statuti as a means of notifying the accused of what law he is charged with offending and unless they so conclude, then the charge is at common law, and if by that law the thing done be no crime, there can be no judgment. State v. Perkins, 82 N. C. 679.

The office of the conclusion "contra formam statuti" is to show the court that the action is founded on the statute, and not an action at common law. Crain v. State, 2 Yerger (Tenn.), 390.

Where the same acts are declared to be an offense and punishable both by statute and by a municipal ordinance an indictment or complaint should conclude contrary to the statute or the ordinance, as the case may be. State v. Gill, 89 Minn. 502, 95 N. W. 449. Examine State v. Soragon, 40 Vt.

In the case of a justice's warrant it has been held that the same particularity in this respect is required as in the case of indictments and that in the case of an offense

conclude, contra formam statuti.33 In this connection it has been decided that a conclusion that the offense is contrary to the form of the "statue" instead of the "statute" will not vitiate an indictment, especially where the necessity of a conclusion is dispensed with by statute.84 And an indictment concluding "contrary to the form of the Act of Assembly in such case made and provided" has been held sufficient.85 But it is held that it is not sufficient in an indictment for an offense created by statute to allege the same to have been committed against the law in such case provided, these words not being an equivalent of the words "against the form of the statute."36 The words "contrary to the form of the statute" are in some cases dispensed with by statutory provisions.37 So where by statute all common law offenses are repealed it is held that it is not necessary to the validity of an indictment that it should conclude "contrary to the form of the statute."38 Again, a conclusion "contrary to the form of the statute in such case made and provided" must be intended to mean the statute of the State in which the indictment is found, as it is said that the courts of one State do not take cognizance of the criminal statutes of another State.<sup>39</sup> So an indictment is defective which concludes against the statute of another county or State.40 The words "con-

created by statute a warrant which concludes "contrary to law" is defective. State v. Lowder, 85 N. C. 564.

33. State v. Cadle, 19 Ark. 621; People v. Enock, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197n.

**34.** State v. Dorr, 82 Me. 341, 19 Atl. 861. See State v. Coleman, 8 S. C. 237.

35. Slymer v. State, 62 Md. 237.

36. Commonwealth v. Inhabitants of Stockbridge, 11 Mass. 279.

37. State v. Stroud, 99 Iowa, 16, 68 N. W. 450; State v. Dorr, 82 Me. 341, 19 Atl. 861. See State v. Cadle, 19 Ark. 613; State v. Culbreath, 71 Ark. 80, 71 S. W. 254.

38. State v. Gill, 89 Minn. 502, 95 N. W. 449.

39. State v. Karn, 16 La. Ann. 183.

40. State v. Holly, 2 Bay (S. C.), 262, holding that where an indictment charged the offense to be against the British statute made of force in this state when in fact there was no such statute made of force here was defective and that a judgment thereon ought to be arrested, the court declaring that if the indictment had concluded against the act of the Legislature, in such case made and provided, it would have been good but that as it concluded against a British act of parliament, which never was in force in this country, it was vitious,

trary to the form of the statute" in the conclusion of an indictment will not meet the omission of averments of fact in the indictment.<sup>41</sup>

§ 436. Where statute merely declaratory of common law.— Where the crime is of common law origin and the statute on the subject is merely declaratory of the common law, the indictment is good without the conclusion contra formam statuti.42 So in the case of an indictment for murder for which the punishment is provided or altered by statute it is decided that the conclusion contra formam statuti is not essential.43 And where a statute merely prescribes a mode of trial or procedure in respect to a common law offense and does not raise the act to a higher offense or impose an additional punishment, an indictment for such an offense need not conclude " against the form of the statute."44 And where a statute does not create an offense, but merely grades a common law offense, it is held that it is not necessary that an indictment therefor should conclude "against the form of the statute," but that it may be at common law. 45 So where the grade of a common law offense has been made higher by statute, the indictment should conclude against the statute, but where the punishment has been mitigated it is held that it may conclude at common law.46

and the court could not by intendment say that the British act of parliament intended to have been made of force here meant an act of the assembly.

41. State v. Stroud, 99 Iowa, 16, 68 N. W. 450, holding that the omission of the word "wilfully" used in defining an offense in a statute is not supplied by the conclusion contrary to the form of the statute.

42. Fuller v. State, 1 Blackf. (Ind.) 63; followed in Hudson v. State, 1 Blackf. (Ind.) 317, wherein it is held that the conclusion "contrary to law" of an indictment for murder is sufficient.

See also United States v. Norris, 1

Cranch. C. C. 411; State v. Ralts, 63 N. C. 503.

Where the statute is only declaratory of what was previously an offense at common law without adding to or altering the punishment, the indictment need not conclude contraformam statuti. People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197n.

43. State v. Harris, 12 Nev. 414; State v. Ralts, 63 N. C. 503. See Hudson v. State, 1 Blackf. (Ind.) 317.

**44.** State v. Dunkley, **25 N.** C. 117.

45. State v. Coon, 18 Minn. 518.

46. State v. Lawrence, 81 N. C. 522. See State v. Ralts, 63 N. C. 503.

But where, what was a misdemeanor only at common law, is made punishable as a felony by statute, or where the statute declares a common law offense, committed under peculiar circumstances and with a particular intent, not necessarily included in the original offense, punishable in a different manner from what it would be without such circumstances and intent, an indictment for the statute offense, bad as such for insufficient or defective description, will not be good at common law.47

§ 437. Indictment for common law offense — Conclusion contrary to statute - Surplusage. - Where an offense as described in the indictment is punishable at common law only, although the indictment aver it to have been committed against the form of the statute, the conclusion may be rejected as surplusage, and the indictment held good as for a common law offense.48 In this connection it is said in an early case in Pennsylvania: "It was formerly held that no indictment grounded on a statute and concluding contra formam statuti, could be maintained as an indictment at common law; but the contrary is now adjudged, and the words contra formam statuti shall be rejected as useless where the offense is prohibited by the common law only. The substance of the indictment being found, the rest is but surplusage, which hurteth not the verdict, and it shall be taken as it may stand by law."49 So concluding an indictment for keeping a common gaming house "contrary to the form of the statute in such case made and provided" will not vitiate it, when it is coupled with an allegation

47. State v. Gove, 34 N. H. 510.

48. Connecticut.-Southworth v. State, 5 Conn. 325; Knowles v. State, 3 Day, 103.

Kentucky.-Gregory v. Commonwealth, 2 Dana, 417.

Maryland.—Davis v. State, Har. & J. 154.

Massachusetts.—Commonwealth v. Reynolds, 14 Gray, 87, 74 Am. Dec. 665; Commonwealth v. Hoxey, 16 Mass. 385.

New Hampshire .- State v. Staaw,

42 N. H. 393; State v. Gove, 34 N. H. 510; State v. Buckman, 8 N. H.

New Jersey.-Cruiser v. State, 18 N. J. L. 206.

New York .- Syracuse & Tully Plank Road Co. v. People, 66 Barb. 25.

South Carolina .- State v. Wimberly, 3 McCord L. 190.

Vermont.—State v. Phelps, 11 Vt. 116, 34 Am. Dec. 672.

49. Respublica v. Newell, 3 Yeates

that the offense charged was a "common nuisance" and a further conclusion "against the peace and dignity of the State," as the words "contrary to the statute" will be disregarded as surplusage.<sup>50</sup>

§ 438. Use of word "statutes" or "statute" in conclusion.— The question of the sufficiency of an indictment which concludes contrary to the "statute" where founded on more than one statute, or contrary to the "statutes," where founded on one statute, is one upon which the decisions are not in harmony. several cases it has been decided that a conclusion "contrary to the form of the statutes" is essential where an indictment is founded on two statutes;51 as where one statute creates the offense and another directs the penalty.<sup>52</sup> In other cases, however, it is held that such a conclusion is not a fatal objection.<sup>53</sup> In this connection it has been decided that where one statute creates an offense and inflicts the penalty, and a later statute imposes another and further penalty, an indictment for such offense may properly conclude in the singular.54 And a conclusion "contrary to the form of the statute" has also been held proper where the second statute simply abridges or limits the discretion of the court with respect to the amount of the fine and the duration of the imprisonment, but in no wise attaches the penalty or punishment to the offense;55 where the latter statute only qualifies the method of proceeding upon the earlier statute, without altering the substance of its purview;56 or where the second statute merely makes some slight alterations

(Pa.), 407, 414, 2 Am. Dec. 381. Per Sмітн, J.

50. Vanderworker v. State, 13 Ark. 700.

51. Tevis v. State, 8 Blackf. (Ind.) 303; Francisco v. State, 1 Ind. 179; State v. Sandy, 25 N. C. 570; State v. Jim, 3 Murph. (N. C.) 3.

State v. Moses, 7 Blackf.
 (Ind.) 244. See also King v. State,
 Ind. 523; Morrison v. Witham, 10
 Me. 425; State v. Cassel, 2 Harr. &

G. (Md.) 407; State v. Pool, 13 N. C. 202.

53. State v. Dayton, 23 N. J. L. 49, 53 Am. Dec. 270; People v. Walbridge, 6 Cow. (N. Y.) 512; State v. Wilbor, 1 R. I. 199, 36 Am. Dec. 245; State v. Robbins, 1 Strobh. (S. C.) 355.

54. Butman's Case, 8 Me. 113.

55. State v. Berry, 9 N. J. L. 374.

56. Morrison v. Witham, 10 Me. 421.

in the prior statute, which do not affect the substance of the offense.<sup>57</sup> And in an early case in New York it is said in this connection by Chancellor Walworth: "Where the statute creating the offense is only amended or regulated, or altered in parts thereof which do not relate to the offense or to the punishment thereof, a conclusion in the singular is proper."58 Where the offense and penalty are both declared by the same statute the indietment should conclude in the singular, 59 and a failure to so conclude is held to be fatal.60 So it is declared in a nearly case in Maryland that where an indictment is founded upon a single statute, and not upon any other in conjunction with it, it is clear that its conclusion must be in the singular.61 Other cases, however, hold that if the offense is punishable by a single statute only, and the conclusion of the indictment is against the statutes, the conclusion will be considered good.<sup>62</sup> And it is decided that a defect arising from a conclusion in the plural where it should be in the singular may be immaterial by reason of a statute.68 It will be seen from these cases, most of which are early decisions, that the authorities are in decided conflict upon this question. At the present time, however, in view of the statutes in force in the various States, which dispense with many of the strict technicalities regarded as essential in the earlier decision, where the rights of the accused are not prejudiced, a conclusion either in the singular, where founded on more than one statute, or in the plural, where founded on one statute, would not be regarded as a fatal defect.

§ 439. Necessity of indorsement "a true bill."—The indorsement "a true bill" which was required at common law as an essential to a valid indictment is in several States, independent of

<sup>57.</sup> Kane v. People, 8 Wend. (N. Y.) 203.

<sup>58.</sup> Kane v. People, 8 Wend. (N. Y.) 203, 212.

<sup>59.</sup> Crawford v. State, 2 Ind. 132; Morrison v. Witham, 10 Me. 421.

<sup>60.</sup> State v. Sandy, 25 N. C. 570, holding in such a case that after con-

viction judgment will be arrested.

<sup>61.</sup> State v. Cassel, 2 Harr. & G. (Md.) 407.

<sup>62.</sup> Carter v. State, 2 Ind. 617; Commonwealth v. Hooper, 5 Pick. (Mass.) 42; Townley v. State, 18 N. J. L. 311, 312.

<sup>63.</sup> Michael v. State, 40 Fla. 265,

any statutory provision to that effect, also a requisite, 64 it being declared that an inference that it was found a true bill arising

23 So. 944, decided under Rev. Stat., § 2893, providing that "No indictment shall be quashed or judgment be arrested, or new trial be granted, on account of any defect in the form of the indictment, or of any misjoinder of offenses, or for any cause whatsoever, unless the court shall be of opinion that the indictment is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense, er expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense."

64. Mose v. State, 35 Ala. 421; Nomaque v. People, 1 III. 145, 12 Am. Dec. 157; Webster's Case, 5 Me. 432; State v. McBroom, 127 N. C. 528, 37 S. E. 193; State v. McLain, 104 N. C. 894, 10 S. E. 518.

By the English practice the uniform mode of authenticating an indictment is "to enter upon it a true bill, and the foreman, accompanied by the grand jurors, carries the indictment so endorsed into court." State v. Squire, 10 N. H. 558.

In this country the practice has been, after an indictment has been duly enrolled, to add the finding: "This is a true bill," and affix to it the signature of the foreman; and indictments thus found are presented to the court in the presence of the jury. State v. Squire, 10 N. H. 558.

It should appear from the record that an indictment was re-

turned into open court "a true bill." State v. Muzingo, Meigs. (Tenn.) 112.

It is immaterial on what part of an indictment the indorsement and grand jury foreman's signature eppears. Blume v. State, 154 Ind. 343, 56 N. E. 771.

Application of words "a true bill."—The words "a true bill " will be taken as applying to offense as charged in the body of the indictment and not to that designated in the indorsement. Cherry v. State, 6 Fla. 679; Collins v. People, 39 Ill. 233; State v. DeHart, 109 La. 570, 33 So. 605.

And where more than one defendant is indicted the indorsement "a true bill" applies to all of the defendants. Thurmond v. State, 55 Ga. 598.

Effect of indorsement "a true bill."—The presumption arises that an indictment was properly presented where it is indorsed a true bill and signed by the foreman of the grand jury. State v. Weaver, 104 N. C. 758, 10 S. E. 486. And it is also presumed that it was found by a legal grand jury. Dutell v. State, 4 G. Greene (Iowa), 125; Harriman v. State, 2 G. Greene (Iowa), 270.

That a copy has no indorsement thereon of "true bill" is not a good ground for a motion in arrest of judgment. Such an exception goes to the form of the indictment, does not affect the real merits of the offense charged, and should be urged before

from the fact that it was returned into court is not justified.65 it has been said that the indorsement by the grand jury of a bill as a "true bill" is the perfection of the indictment, that it touches it principally, and is the life of it.66 And the fact that an indictment is endorsed "a true bill," the endorsement signed by the foreman, and the indictment properly filed, are evidence that the indictment has been found by the grand jury.67 So in a case in Tennessee it is held that there being no such endorsement on the bill, and nothing in the record to show that the indictment was returned a true bill, the indictment is bad.68 And where this endorsement is essential it is decided that the defect, caused by its omission, is not cured by a statute providing that an indictment is to be regarded as sufficient where the charge is expressed in a plain, intelligible and explicit manner, and that a mere informality shall not be ground for quashing the indictment or for an arrest of judgment if sufficient matter is stated to enable the court to proceed to judgment. 69 Evidence, however, is held admissible

trial. Hughes v. State, 79 Ga. 39. See State v. Burgess, 24 Mo. 381.

Sufficiency of indorsement.—
The indorsement upon an indictment of the words "true bill" followed by the signature of the foreman of the grand jury, has been held sufficient, the omission of "a" not rendering it defective (Martin v. State, 30 Neb. 507, 46 N. W. 621; State v. Elkins, Meigs [Tenn.], 109; State v. Davidson, 12 Vt. 300), as has also the indorsement "a bill." Sparks v. Commonwealth, 9 Pa. St. 354. But an indorsement "this bill found" has been held insufficient. State v. McBroom, 127 N. C. 528, 37 S. E. 193.

A printed indorsement "a true bill" followed by the name of the foreman of the grand jury is sufficient. State v. Hogan, 31 Mo. 342.

Certificate of foreman no part of indictment.—The certificate of the foreman of the grand jury that it is a true bill indorsed upon an indictment is no part of the indictment but simply the statutory mode of authenticating i<sup>\*</sup>. Brotherton v. People, 75 N. Y. 159; see State v. Thacher Coal & Coke Co., 49 W. Va. 140, 38 S. E. 539.

**65**. State v. McBroom, 127 N. C. 528, 37 S. E. 193.

66. Mose v. State, 35 Ala. 421.

67. State v. McCartey, 17 Minn. 76; see State v. O'Brien, 18 R. I. 105, 25 Atl. 910.

The indorsement of a bill "a true bill" and the signing thereof by the foreman is the evidence which the law requires to show a concurrence of the requisite number of the grand jury in the finding. Laurent v. State, 1 Kan. 313.

68. Gunkle v. State, 6 Baxt. (Tenn.) 625.

69. State v. McBroom, 127 N. C. 528, 37 S. E. 193.

to show that an indictment was, by mistake, endorsed "a true bill."70

§ 440. Same subject — Contrary view.—In a note to an early case in Illinois in which this doctrine is asserted, that the endorsement "a true bill" is essential, 71 it is said: "If an indictment has been fairly and legally found, if the offense is charged in the manner required by the laws, if the court has received it from the grand jury as a true bill, and so entered it on its records, the omission of a useless form, the reason for which has, long since, become obsolete, ought not to intervene to prevent a fair and impartial trial on the merits." And this is the rule which is accepted in many jurisdictions where such an endorsement is not required by statute.<sup>72</sup> So it is said in a case in West Virginia that the fact that an indictment was not endorsed a true bill and signed by the foreman of the grand jury, while highly proper for the purpose of additional identification, has never been held absolutely essential.<sup>73</sup> And it has been declared by the United States Supreme Court: "There is in the Federal statutes no mandatory provision requiring such endorsement or authentication, and the matter must, therefore, be determined on general principles. may be conceded that in the mother country, formerly at least. such endorsement and authentication were essential.

70. State v. Horton, 63 N. C. 595, holding that if a bill of indictment be endorsed "a true bill" by mistake, when the grand jury had ordered their clerk to endorse it "not a true bill," the defendant may show that fact by affidavit or otherwise, either upon a motion to quash or upon a plea in abatement, and thereupon the indic+ment should be quashed.

71. Nomaque v. People, 1 Ill. 145,12 Am. Dec. 157.

72. United States.—Frisbie v. United States, 157 U. S. 163, 15 Sup. Ct. 586, 39 L. Ed. 657.

Massachusetts.—Commonwealthv. Smyth, 11 Cush. 473.

New Jersey.—State v. Magrath, 44 N. J. L. 227.

North Carolina.—State v. Sultan, 142 N. C. 569, 54 S. E. 841.

Virginia.—Miller v. Commonwealth (Va.), 21 S. E. 499; White v. Commonwealth, 29 Gratt. 824; Price v. Commonwealth, 21 Gratt. 846.

West Virginia.—State v. Grove (W. Va. 1907), 57 S. E. 296.

73. State v. Hill, 48 W. Va. 132, 35 S. E. 831.

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dorsement is parcel of the indictment and the perfection of it.74 But this grew out of the practice which there obtained. of indictment or formal accusations of crime were prepared and presented to the grand jury, who, after investigation, either approved or disapproved of the accusation, and indicated their action by the endorsement, 'a true bill' or 'ignoramus,' or sometimes, in lieu of the latter, 'not found,' and all the bills thus acted upon were returned by the grand jury to the court. In this way the endorsement became the evidence, if not the only evidence, to the court of their action. But in this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial. to direct the preparation of the formal charge or indictment. Thus they return into court only those accusations which they have approved, and the fact that they thus return them into court is evidence of such approval, and the formal endorsement loses its essential character."75 So the fact that the record of a criminal cause, on a change of venue to another county, fails to show that the indictment therein had been endorsed "a true bill," over the signature of the foreman of the grand jury, is not ground for a motion to quash.76

§ 441. Same subject — Statutory provisions requiring endorsement.—In some States by statute it is essential to the sufficiency of an indictment that it should be endorsed "a true bill." So in Indiana it has been held that a statute requiring the endorsement "a true bill" on the back of an indictment is imperative, and that in the absence of such endorsement, although the name of the foreman is endorsed thereon, the indictment is bad

<sup>74.</sup> King v. Ford, Yelv. 99.

**<sup>75.</sup>** Frisbie v. United States, 157 U. S. 163, 15 Sup. Ct. 586, 39 L. Ed. 657.

<sup>76.</sup> Beard v. State, 57 Ind. 8.

<sup>77.</sup> Colorado.—Board of County Com. v. Gráham, 4 Colo. 201.

Florida.—Alden v. State, 18 Florida, 187.

Illinois.—Gardner v. People, 4 Ill. 83.

Indiana.—State v. Buntin, 123 Ind. 124, 23 N. E. 1140; Cooper v. State, 79 Ind. 206.

and may be taken advantage of by a motion to quash.<sup>78</sup> But where the statute provides that an indictment shall be set aside, upon motion of the defendant, when not endorsed "a true bill," provided the motion be made before a demurrer or plea is interposed, and that if not thus made the defendant shall be precluded from afterward taking the objection, an objection that an indictment is not so endorsed must be raised before demurrer or plea.<sup>79</sup> And where the endorsement upon an indictment is in substantial compliance, although not in strict accordance, with the code, it is sufficient if it appears that the indictment was legally found and presented by the grand jury.<sup>80</sup>

§ 442. Endorsement of names of witnesses.—It is not, as a general rule, essential to the validity of an indictment that there should be an endorsement thereon of the name of the witnesses upon whose evidence the indictment was found, it being held that a statutory provision requiring such an endorsement is merely directory. So the fact that the record contains no endorsement of the names of witnesses upon the indictment, as required by the New York Code of Criminal Procedure, does not overcome the presumption that the indictment was based upon legal and suffi-

**Kentucky.**—Oliver v. Commonwealth, 95 Ky. 372, 15 Ky. Law Rep. 662, 25 S. W. 600.

Louisiana.—State v. Logan, 104 La. 254, 28 So. 912.

**Tennessee.**—Bird v. State, 103 Tenn. 343, 52 S. W. 1076.

78. State v. Buntin, 123 Ind. 124, 23 N. E. 1140.

79. People v. Lawrence, 21 Cal. 368.

80. Dixon v. State, 4 G. Greene (Iowa), 381.

81. Steele v. State, 1 Tex. 142; Shelton v. Commonwealth, 89 Va. 450, 16 S. E. 355; Commonwealth v. Williams, 5 Gratt. (Va.) 702; Wortham v. United States, 5 Rand. (Va.) 669; State v. Shores, 31 W. Va. 491, 7 S. E. 413.

A failure to indorse the names is not a ground for a motion in arrest of judgment (State v. Sultan, 142 N. C. 569, 54 S. E. 841), or for a demurrer or a plea in abatement. Parker v. State, 125 Ala. 86, 27 So. 780.

Indorsement of names after indictment filed.—Names of witnesses may be indorsed after the indictment has been filed (Germolgez v. State, 99 Ala. 216), and prior to the commencement of the trial. State v. Doyle, 107 Mo. 36, 17 S. W. 751. And it has been held that such an indorsement may be made at the trial.

cient evidence.<sup>82</sup> In some jurisdictions, however, it is held that a statutory provision to this effect must be complied with. So in Iowa it is decided that where it is provided by statute that the names of the witnesses on whose evidence an indictment is found must be endorsed thereon before it is presented to court and must be, with the minutes of the evidence of such witnesses, presented to the court, a compliance with such requirement is essential, and an indictment not so returned will, on motion, be set aside.<sup>83</sup> Such

Johnson v. State, 34 Neb. 257, 51 N. W. 835; compare People v. Howes, 81 Mich. 396, 45 N. W. 961.

The court may order the return of the indictment to the grand jury to have the names indorsed thereon. State v. McNamara, 100 Mo. 100, 13 S. W. 938.

It is prima facie evidence where name of a witness is indorsed that the indictment was found on his testimony. Virginia v. Gordor, l Cranch. C. C. 48.

Where the surname and initials of the christian name are indorsed there is a sufficient compliance with a statutory requirement as to indorsement of names of witnesses. Basye v. State, 45 Neb. 261, 63 N. W. 811.

The accused acquires no right from the fact that the names of witnesses are indorsed to demand on his trial that the prosecution shall call and swear all of them. State v. Ford, 42 La. Ann. 255, 7 So. 696.

Return of list of witnesses for term.—In Hathaway v. State, 32 Fla. 56, 13 So. 592, it is decided that, under a statute requiring the foreman of every grand jury to return to the court a list under his hand of all witnesses who shall have been sworn before the grand jury during the term, to be filed of record by the clerk, compliance or non-compliance therewith could not in any way affect the validity of any special indictment that might be regularly found and presented by any such grand jury or the rights of any such indicted individual.

82. People v. Glen, 173 N. Y. 395, 66 N. E. 112; see § 271 New York Code Cr. Proc.

83. State v. Hasty, 121 Iowa, 507, 90 N. W. 1115, decided under Iowa Code, § 5276 et seq.

The minutes returned are conclusive under such a statute as to whether all witnesses examined are indorsed, and neither the affidavits of jurors nor admissions by the county attorney are receivable to contradict them. State v. Miller, 95 Iowa, 368, 64 N. W. 288. In this connection, however, it is decided in a later case in this state that the fact that the transcript of the evidence of the examination before the magistrate, instead of a minute thereof made by the clerk of the grand jury, was returned with the indictment, is not prejudicial to the defendant. v. Turner, 114 Iowa, 426, 87 N. W. 287. It was said in this case that the a statute does not, however, render it necessary that the name of every witness shall be endorsed, but only those who give some evidence in reference to the matter under investigation. And it has been decided that the failure to endorse the names of witnesses who gave evidence will not cause an indictment to be set aside unless they gave evidence which contributed to the finding of the indictment. 85

§ 443. Endorsement of title of cause.—In the absence of a statute requiring an endorsement of the title of the cause upon an indictment, such an endorsement is not necessary. So an endorsement by the prosecuting officer of the title of the case is to be regarded as a mere memorandum for the convenience of reference to distinguish it from other papers of a similar character. It constitutes no part of the indictment, it imparts no vitality, nor does

transcript informed the defendants more fully of the evidence against them than would the minute thereof and as fully as to the names of the witnesses to be examined.

Under the code in Iowa an indictment may be found "upon the minutes of the evidence given by witnesses before the committing magis-Iowa Code, § 4273. trate." this provision it was decided, there being no requirement that the person writing out the testimony should be sworn, that where the stenographic notes of the evidence of witnesses upon the preliminary examination in a criminal cause, taken by one not under oath, were transcribed by the stenographer in typewriting, and such copy was certified to by the justice, and returned to the clerk of the District Court as the minutes of the testimony taken before him on such examination, such certified transcript was sufficiently authenticated to authorize the grand jury to act upon it and to endorse the names of the witnesses given therein upon the indictment. State v. Wise, 83 Iowa, 596, 50 N. W. 59.

84. "The names of witnesses examined before the grand jury who give evidence concerning the case in hand, and none others, should be indorsed on the indictment. The statute does not require the folly of indorsing the names of persons who have no knowledge, and give no evidence touching the matter under investigation, merely because they have been called before the grand jury and inquired of in reference thereto." Per MILLER, J., in State v. Little, 42 Iowa, 51. See also State v. Lewis, 96 Iowa, 286, 65 N. W. 295.

85. State v. Miller, 95 Iowa, 368, 64 N. W. 288. See State v. Hawks, 56 Minn. 129, 57 N. W. 455.

86. State v. Marion, 14 Mont. 458, 36 Pac. 1044.

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it give any validity to the instrument.<sup>87</sup> And in a case in Virginia where an indictment was for breaking into a house in the day time and stealing money therefrom, and the grand jury endorsed it, "An indictment for larceny, A true bill," and the prisoner was tried upon it, and there was a general verdict of guilty, it was held that there was no error in overruling a motion in arrest of judgment, on the ground that the grand jury only found an indictment against him for larceny, whilst the indictment charged him with housebreaking and larceny.<sup>88</sup> So in an early case it is decided that the omission of a letter in the title of a bill found by a grand jury is not a good ground of a motion in arrest of judgment, where the prisoner has pleaded to it, and been convicted on it, especially where the name is properly stated in the body of the indictment itself.<sup>89</sup>

§ 444. Endorsement of name or nature of offense.-Where there is no statutory provision requiring it, an endorsement upon an indictment of the name or nature of the offense is not essential to its validity.90 So an indictment is not vitiated by the fact that there is an endorsement thereon of an offense which is different from that stated in the body of the indictment.91 So it is said in this connection: "If to this endorsement on the indictment of the words 'a true bill' there is added, as is frequently done, a brief description of the contents of the indictment, such addition to these words 'a true bill,' though signed by the foreman of the grand jury, would institute no part of their charge or action, but would be considered as mere surplusage; and as such additions to these words 'a true bill' can serve no useful purpose, they ought not to be made. If, however, such additions are made, they will be regarded as surplusage; and if, therefore, they are incorrect or even inconsistent with the indictment, they will not vitiate

<sup>87.</sup> Cherry v. State, 6 Fla. 679.88. Hall's Case, 3 Gratt. (Va.)593.

<sup>89.</sup> State v. Duestor, 1 Bay (S. C.), 377.

<sup>90.</sup> Cherry v. State, 6 Fla. 679; State v. Rohfrischt, 12 La. Am. 382; State v. Fitzpatrick, 8 W. Va. 707.

<sup>91.</sup> Collins v. People, 39 Ill. 233.

it, as they will be regarded as no part of the finding of the grand jury."92

§ 445. Necessity of signature of foreman of graind jury.—It is said in an early case in North Carolina that neither a presentment of a grand jury nor an indictment requires necessarily that it should be signed by any one.<sup>93</sup> And it may be stated as a general rule that although it is the practice for the foreman to sign his name to the finding of the grand jury,<sup>94</sup> yet, in the absence of a statute to the contrary, such signature is not essential.<sup>95</sup> And in a late case in Georgia it is said that there is no positive law requiring that the foreman of the grand jury shall sign the finding of true bill at all. It was not required at common law. If it be indispensable that the foreman shall sign it, the defect arising from failure to sign it is at least not ground for a motion in arrest of judgment.<sup>96</sup> So in an early case in South Carolina it was held that the finding of a grand jury in writing which had been publicly announced by the clerk in their presence, was good, al-

92. State v. Heaton, 23 W. Va. 779.

93. State v. Cox, 28 N. C. 440.

94. It is the practice for the foreman to sign his name to the finding of the grand jury; and it seems to be a salutary practice, as it tends to the more complete identification of the instrument containing the accusation. We do not know in what it had its origin; but though useful and proper it does not seem to be essential, nor to have been, at any time the course in England. State v. Calhoun, 18 N. C. 374.

95. Georgia.—McAllister v. State (Ga. 1907), 58 S. E. 1110.

**Kentucky.**—Commonwealth **v** Ripperdon, 1 Litt. Sel. Cas. 194.

North Carolina.—State v. Mace, 86 N. C. 668.

South Carolina.—State v. Creighton, 1 Nott. & McC. 256.

Texas.—State v. Flores, 33 Tex. 444; State v. Powell, 24 Tex. 135; Robinson v. State, 24 Tex. App. 4, 5 S. W. 509. These cases were decided under a provision of the code that the want of the signature of the foreman of the grand jury is not a matter of exception to an indictment and does not affect its validity.

Virginia.—Price v. Commonwealth, 21 Gratt. 846.

West Virginia.—State v. Hill, 48 W. Va. 132, 35 S. E. 831.

96. McAllister v. State (Ga. 1907), 58 S. E. 1110; see Barlow v. State, 127 Ga. 62, 56 S. R. 131.

## § 445 Conclusion, Indorsements and Signatures.

though not signed by the foreman.<sup>97</sup> The court said in this case: "The finding of the grand jury is an expression of their conviction as to the truth of the charge contained in the indictment, and it is only necessary that it should be done in such a manner as to prevent misconstruction or perversion. It has long been a custom in this State for the foreman of a grand jury to sign their finding, and perhaps it would still be advisable to adhere to it. But I concur in the opinion that its being in writing, and having been publicly announced by the clerk, as is invariably the case, in the presence of the grand jury, is a sufficient guard against misconstruction or perversion; and as there is no positive law requiring it that it is not essentially necessary to its validity that it should be signed by the foreman."98 And it not being necessary that the name of the foreman of the grand jury appear at the bottom of the indictment, it is immaterial that the district attorney was permitted to add the name after the trial began.<sup>99</sup> In other cases, however, it is held that indictments found by the grand jury should be signed by the foreman. And in this connection it has been held that, where a trial had been commenced and it was then discovered that the indictment was not signed by the foreman of the grand jury, no further proceedings could be had on it.2 And in another case, where an indictment was returned into court, but the signature of the foreman was by accident omitted, it was held that it could not afterwards be affixed by the foreman, or amended, except on recommitment to the jury.3 Where, by statute, a bill should be endorsed "a true bill" and signed by the foreman, such endorsement and signature are essential to validity.4 In other

97. State v. Creighton, 1 Nott. & McC. (S. C.) 256.

98. Per Johnson, J.

99. James v. State (Tex. Cr. 1907), 105 S. W. 179.

Nomaque v. People, 1 Ill. 145,
 Am. Dec. 157; State v. Squire, 10
 H. 558. See Coburn v. State (Ala. 1907), 44 So. 58.

2. Commonwealth v. Sargent,

Thach. Cr. Cas. (Mass.) 116.
3. State v. Squire, 10 N. H. 558.

 Colorado.—Board of County Comm'rs v. Graham, 4 Colo. 201.

Florida,—Alden v. State, 18 Florida, 187.

Illinois.—Gardner v. People, 4 Ill. 83.

Indiana.—Cooper v. State, 79-Ind. 206. cases, however, it is decided that a statutory provision that the foreman of the grand jury shall sign the endorsement "a true bill" upon indictments, is directory, and that the objection to the irregularity is waived, unless made before pleading.<sup>5</sup>

§ 446. Signature of foreman — What is sufficient.—An indictment is properly certified by the foreman of the grand jury although in affixing his signature he makes use of only the initials of his christian name.<sup>6</sup> So it has been declared that there is no rule of the common law rendering official acts void when signed with the initial letters of the christian name of the public official whose signature may be required and that where there is no statutory provision to this effect an indictment is properly certified by the foreman of the grand jury, although in affixing his signature he makes use of only the initials of his christian name.<sup>7</sup> And a difference between the designation of the foreman in the endorsement and the body of the indictment constitutes no reason for

**Kentucky.**—Oliver v. Commonwealth, 95 Ky. 372, 25 S. W. 600.

**Louisiana.**—State v. Logan, 104 La. 254, 28 So. 912.

**Tennessee.**—Bird v. State, 103 Tenn. 343, 52 S. W. 1076.

State v. Agnew, 52 Ark. 275, 12
 W. 563.

Time of making objection.—Such a defect should be taken advantage of by a motion to set aside the indictment or by demurrer. State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; State v. Murphy, 47 Mo. 274.

A defect in an indictment arising from the fact that it is not signed or indorsed by the foreman of the grand jury is waived where the accused goes to trial on a plea of not guilty. People v. Johnston, 48 Cal. 549. See also McGuffie v. State, 17 Ga. 498.

So a statutory provision requiring

the foreman of a grand jury to certify under his hand the indictment is a true bill, is merely directory and after a defendant has been convicted, upon an indictment not thus certified, it is too late, upon a motion in arrest, to raise this objection. State v. Mertens, 14 Mo. 94.

Alabama.—Germolgez v. State,
 Ala. 216.

Indiana.—Anderson v. State, 26 Ind. 89; Zimmerman v. State (Ind. App.), 31 N. E. 550.

Iowa.—State v. Groome, 10 Iowa, 308.

Maine.—State v. Taggart, 38 Me. 298.

Mississippi.—Easterling v. State, 35 Miss. 210.

7. State v. Taggart, 38 Me. 298. See also Easterling v. State, 35 Miss. 210.

quashing the indictment.8 It is also immaterial on what part of an indictment the endorsement and grand jury foreman's signature So the fact that the name of the foreman is endorsed preceding the words "a true bill" is no ground for quashing an indictment.10 And where a statute provides that indictments shall be signed by the foreman, but does not direct where the signature is to be placed, the affixing of the signature after the words "a true bill" is sufficient. 11 And, though it is the better practice, it is not essential to the validity of an indictment, in the absence of a statute requiring it, that the foreman of a grand jury, in endorsing an indictment "a true bill," should describe himself as foreman, as the court, having appointed him, is presumed to know who the foreman is.<sup>12</sup> And where a bill of indictment was endorsed "a true bill," and to the signature of the foreman the letters "F. G. J." were added, it was held sufficient to indicate that he acted as foreman, where it appeared from the record that such person was in fact the foreman of the grand jury when the bill was And it was declared in this case that even if no letters had been added, after his name, his subscription to the endorse-

8. Meadows v. State, 121 Ga. 362, 49 S. E. 268. See Deitz v. State, 123 Ind. 85, 23 N. E. 1086, holding that where the name of Thomas Bellows appeared on the indictment as the foreman of the grand jury returning the same, while the transcript recited that George Bellows acted as such foreman, it must be presumed that he whose name appeared on the indictment was the duly appointed foreman, and that the recital to the contrary in the transcript was a mistake of the clerk and that it must be also presumed that the judge whose duty it was to inspect the indictment, knew who the foreman of the grand jury was at the time the indictment was returned.

In State v. Stedman, 7 Port. (Ala.)

495, it was also held that the fact that a bill of indictment was endorsed by Alexander R. Hutchinson, instead of Hutcheson, as foreman of the grand jury, no valid objection thereto was, though it appeared by the record that Alexander R. Hutcheson was appointed foreman by the court, it being declared that if necessary the court will intend the two names to indicate the same person.

Blume v. State, 154 Ind. 343, 56
 E. 771.

10. State v. Bowman, 103 Ind. 69.11. Overshiner v. Commonwealth,

2 B. Mon. (Ky.) 344.

12. Whiting v. State, 48 Ohio St. 220, 27 N. E. 96; State v. Brown, 31 Vt. 602. See Commonwealth

ment could only be referred to his official act as foreman, and would therefore be sufficient.<sup>13</sup> Again, it has been decided that an indictment is not vitiated by the fact that the name of the foreman is signed by another person.<sup>14</sup> And it is no objection to an indictment that it is endorsed "a true bill" by one of the jury as "special foreman of the grand jury," when his appointment as such *pro tem* appears of record, though the record fails to show the absence of the regular foreman or that he was excused or discharged, this being presumed in the absence of proof to the contrary.<sup>15</sup>

§ 447. Necessity of signature of public prosecutor.—It is a general rule that, in the absence of a statute to the contrary, it is not an essential to a valid indictment that it should be signed by the public prosecutor,<sup>16</sup> it being sufficient if found by the grand

v. Walters, 6 Dana (Ky.), 291, holding that the words "a true bill" must be endorsed upon every indictment found by the grand jury but that there is no law requiring that they shall be signed by the foreman and that the omission of the foreman to add "foreman" to his name, in signing the indorsement upon a true bill (which he had signed at the foot with that addition) is no ground for a quashal.

13. State v. Chandler, 9 N. C. 439. The court said: "It is also objected, that the person who subscribes the indorsement on the bill, does not appear to have done so as foreman; that the letters, following his name, are equivocal, and may import many things. But it appears upon this record, that William Bullock was foreman of the grand jury when the bill was found, and therefore, if no letters had been added after his name, his subscription to the indorse-

ment could only be referred to his official act as foreman. The signature cannot be referred to Bullock's natural or private capacity, for that gave him no right to authenticate an official paper, but his political capacity did; in the same manner, as if a magistrate signs a warrant, or a judgment, without any letters indicating his judicial character, the signature must, nevertheless, be referred to that."

14. State v. Powell, 24 Tex. 135; Witherspoon v. State, 39 Tex. Cr. 65, 44 S. W. 164, 1096.

15. State v. Collins, 6 Baxt. (Tenn.) 151.

16. United States.—Ex parte Lane, 135 U. S. 443, 10 Sup. Ct. 760, 34 L. Ed. 219.

Arkansas.—Watkins v. State, 37 Ark. 370.

**Georgia.**—Newman v. State, 101 Ga. 534, 28 S. E. 1005.

Iowa.—State v. Mathews (Iowa,

jury and endorsed by their foreman.<sup>17</sup> So it is said in a case in Maine: "In this State, as in many others (in some of which we believe it is required by statute), the public prosecuting officer who drawns the indictment habitually countersigns it in his official capacity. In fact the custom has been so invariable here, we recall no other instance of the omission of such official countersigmatter. But however uniform the custom has been, and how much soever we might regret a discontinuance of any such purely formal practice in criminal procedure, we know of no rule in the common law, we are sure there is no statute in this State, making such countersigning essential to the validity of an indictment. Otherwise the grand jury would be entirely under the control of the prosecuting officer."18 And a similar doctrine is asserted in a case in North Carolina,19 and in a late case in Alabama,20 and it has been decided that the omission of the signature of the prosecuting attorney, even if essential to an indictment, is a formal defect

1906), 109 N. W. 616; State v. Wilmoth, 63 Iowa, 380, 19 N. W. 249; State v. Ruby, 61 Iowa, 86, 15 N. W. 848.

**Kentucky.**—Sims v. Commonwealth, 12 Ky. Law Rep. 215, 13 S. W. 1079.

Louisiana.—State v. Crenshaw, 45 La. Ann. 496, 12 So. 628.

Maine.—State v. Reed, 67 Me. 127.

Massachusetts.—Commonwealth v. Stone, 105 Mass. 469.

Missouri.—State v. Murphy, 47 Mo. 274.

South Carolina.—State v. Coleman, 8 S. C. 237.

Texas.—Eppes v. State, 10 Tex. 474.

Virginia.—Brown v. Commonwealth, 86 Va. 466, 10 S. E. 745.

17. Watkins v. State, 37 Ark. 370, citing Anderson v. State, 5 Ark. 444.

18. State v. Reed, 67 Me. 127, 129. Per Virgin, J. See also Keitler v. State, 10 Sm. & M. (Miss.) 192, where similar language is used.

19. "The signature of the prosecuting officer, while usually attached to the indictment, forms no part of it and is in no manner essential to its validity. The indictment is not his work, but is the act of the grand jury declared in open court, and need not be signed by any one; and if it be, it is mere surplusage and cannot vitiate it." State v. Mace, 86 N. C. 668, 669. Per RUFFIN, J.

20. "It was not essential to the validity of the indictment that it should have been prepared or signed by the solicitor. It 'receives its legal efficacy from the finding and return of the grand jury; and the legal evidence of its verity is the return "a true bill" apparent upon some part

to be taken advantage of by demurrer or motion to quash before the jury is sworn.<sup>21</sup> But an indictment has been held insufficient where not signed by the prosecuting attorney or any one else, and where it did not appear from the record in any place or manner that it was returned by the grand jury.<sup>22</sup> In some States the signature of the public prosecutor is required by statute.<sup>23</sup> And in Tennessee it is decided in an early case that the official signature of the district attorney general to an endorsement on an indictment directing what witnesses shall be summoned does not cure the want of a signature to the indictment itself.<sup>24</sup>

§ 448. Signature of public prosecutor — Who may sign.— Even though the signature of the prosecuting officer may be essential to the validity of an indictment, it is held sufficient if placed thereon by his authority.<sup>25</sup> And the fact that one who is acting as public prosecutor pro tem affixes his own signature to an indictment as public prosecutor is not an objection to its validity.<sup>26</sup> So an indictment which is signed by one as "special prosecuting attorney" is not subject to a motion to quash or to a plea in abatement which does not deny that the special prosecuting attorney had been duly appointed, as a court takes cognizance of the genuine-

of it bearing the signature of the foreman." Prince v. State, 140 Ala. 158, 163, 37 So. 171. Per Tyson, J., citing Holly v. State, 75 Ala. 14; Joyner v. State, 78 Ala. 448.

**21.** State v. Crenshaw, 45 La. Ann. 496, 12 So. 628.

22. Heacock v. State, 42 Ind. 393, wherein it is said: "Without these requisites the indictment had no more force than a blank piece of paper. It could not subject the party to trial and punishment under it, but ought to have been quashed on motion." Per Pettit, J.

23. Taylor v. State, 113 Ind. 471, 16 N. E. 83.

See the statutes of the various states as to the necessity of such signature.

24. State v. Lockett, 3 Heisk. (Tenn.) 274.

25. Newman v. State, 101 Ga. 534, 28 S. E. 1005; State v. Mathews (Iowa, 1906), 109 N. W. 616. See People v. Etting, 99 Cal. 577, 34 Pac. 237.

Turner v. State, 89 Tenn. 547,
 S. W. 838; State v. Johnson, 12
 Tex. 231; Reynolds v. State, 11 Tex.
 See also State v. Moxley, 102
 Mo. 374, 14 S. 'V. 969, 15 S. W. 556.

ness of their official signatures and designation.27 And though it is provided by statute that an indictment shall be signed by the prosecuting attorney, yet it has been decided that if it be signed by the deputy prosecuting attorney it will be presumed on appeal, in the absence of a showing to the contrary, that a sufficient reason existed therefor, and that judgment will not be reversed.28 So where, by statute, the attorney-general may be required by the governor to appear and prosecute criminal proceedings in any county, he becomes the prosecuting attorney of that county in such proceedings, and as such may sign indictments presented by the grand jury.29 And it is no objection to an indictment that a wrong person signed it as the prosecuting officer, where such signature is not required by statute.30

§ 449. Signature of public prosecutor — What is sufficient. -If an indictment be signed by the prosecuting attorney by his surname in full and his christian name by its initials it is suffi-And an indictment has been held sufficient where the cient.31 name of the prosecuting attorney, with the title of his office annexed, was printed at the bottom instead of being written, as is usual in attaching the name of that office.32 Again, where the

27. Choen v. State, 85 Ind. 209. See also Territory v. Layne, 7 Mont. 225, 14 Pac. 705; Territory v. Harding, 6 Mont. 323, 12 Pac. 750; State v. Johnson, 12 Tex. 231.

28. Taylor v. State, 113 Ind. 471, 16 N. E. 83. The court said: "The indictment having been verified by the signature of a deputy prosecuting attorney, an officer who is required to act under an official oath, we may well presume that some sufficient reason appeared to the court into which the indictment was returned for the absence of the name of

prosecuting attorney." Per-MITCHELL, J.

Compare State v. Amos, 101 Tenn. 350, 47 S. W. 410.

29. State v. Bowles, 70 Kan. 821, 79 Pac. 726, followed in State v. Campbell, 70 Kan. 899, 900, 79 Pac. 1133.

30. State v. Kovolosky, 92 Iowa, 498, 61 N. W. 223. See Caha v. United States, 152 U.S. 211, 221, 14 Sup. Ct. 513, 38 L. Ed. 415.

31. Vanderkarr v. State, 51 Ind.

32. Hamilton v. State, 103 Ind. 96,.

eaption and body of the indictment designate the county in which it is found, and the prosecuting officer signs the indictment officially, it is not necessary that he should add to such signature the name of the county of which he is attorney.<sup>33</sup> And the fact that the prosecuting officer affixes a wrong designation of his office to his signature does not affect the sufficiency of an indictment.<sup>34</sup>

2 N. E. 299, 53 Am. Rep. 491. See Miller v. State, 36 Tex. Cr. 47, 35 S. W. 391, holding an indictment sufficient where the name was typewritten.

33. People v. Ashnauer, 47 Cal. 98.

See also Commonwealth v. Beaman, 8 Gray (Mass.), 497.

34. Baldwin v. State, 12 Ind. 383; State v. Myers, 85 Tenn. 203, 5 S. W. 377.

# **FORMS**

#### Precedents of Forms.1

(1. In the following pages are given forms of indictments for various offenses which have either received judicial approval or have been used in cases where their sufficiency has not been questioned. In a very few instances the formal commencement has been omitted, owing to the fact that it is not given in the report of the case from which the form is taken. In such a case, in order to prepare a complete indictment, reference may be had to the notes to section 177 herein, where several forms of commencement are given, which have been approved by the courts.]

### FORM 1.

#### Admission of Prisoner to Bail in Violation of Statute.

('ITY AND COUNTY OF NEW YORK, SS.:

The jurors of the people of the State of New York, in and for the body of the city and county of New York, upon their oath present; That Abraham Bogart, late of the first ward of the city of New York, in the county of New York, aforesaid, junior, on the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and fifty-five, at the ward, city and county aforesaid, with force and arms, acted as and was, and yet acts and is, one of the police justices for the city of New York. That he, the said Abraham Bogart, Jr. as police justice as aforesaid, was prohibited by law from letting to bail any person charged with a criminal offense in any case wherein he, the said Abraham Bogart, Jr. was not the committing Magistrate, unless notice of the application to bail such person should have been given to the district attorney of the city and county of New York, at least two days before such application, specifying the name, the officer, the time and place when and where such application would be made, and the name and residence of the proposed bail, and the original commitment, and proofs upon which it was founded, should have been presented to him, as fully appears, by the eighth section of an act passed May thirteenth, one thousand eight-hundred and forty-six entitled "An Act to amend an act entitled 'An act for the establishment and regulation of the police of the city of New York," passed May the seventh, one thousand eight hundred and forty-four, and in the words

following: "No officer other than the committing Magistrate shall let to bail any person charged with a criminal offence, unless notice of the application to bail such person shall have been given to the district attorney of the city and county of New York, at least two days before such application, specifying the name of the officer, the time and place and where such application will be made, and the name and residence of the proposed bail, and the original commitment and proofs upon which it is founded shall have been presented to the officer to whom the application for bail is made. The person having the custody of such commitment and proofs shall, when required in writing, produce the same before the officer last mentioned." That while such law was in force and in effect, one William Nambe, otherwise called William Lambe, was indicted in the court of General Sessions of the Peace in and for the said city and county of New York, on the fourth day of April, one thousand eight hundred and fifty-five, for the crime of grand larceny, in feloniously stealing, taking and carrying away the goods, chattels and personal property of one James E. Miller, and thereafter, on such indictment. was committed to the custody of the keeper of the city prison, to await his trial on such indictment by a magistrate of the city and county of New York, viz., James M. Smith, Jr., Esq., recorder of the city of New York, That whilst the said William Nambe, otherwise called William Lambe, stood committed, as aforesaid, by the said James M. Smith, Jr. Esq. recorder as aforesaid, the said Abraham Bogart, Jr. well knowing such law aforesaid, with force and arms, at the ward, city and county aforesaid, on the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and forty-five, did willfully, unlawfully maliciously and corruptly, admit to bail said William Nambe, otherwise called William Lambe, as appears by the said recognizance, to answer then and there, by the said Abraham Bogart, Jr., police justice, taken in the words and figures following, to wit:

#### CITY AND COUNTY OF NEW YORK,

Be it remembered, that on the twenty-eight day of July, one thousand eight hundred and fifty-five, William Nambe, alias Lambe, of number , Brooklyn Nassau Street, in the city of New York, and Joseph Porkousky, of number two hundred and ninety-eight Houston-street, in the said city personally came before me, the undersigned, one of the police Justices in the city of New York, and acknowledged themselves to owe to the people of the State of New York, that is to say the said William Nambe, alias Lambe, the sum of ten hundred dollars and the said Joseph Porkousky the sum of ten hundred dollars, separately of good and lawful money of the State of New York to be levied and made of their respective goods and chattels and tenements, to the use of said people, if default shall be made in the condition following viz. Whereas, the said William Nambe, alias Lambe, was indicted in the Court of General Sessions, for having committed the crime of grand larceny in the city and county aforesaid; and where as he has been brought before said justice to answer

said charge, and upon the examination of the whole matter, pursuant to statute, it appearing to said justice that said offence has been committed, and there is probable cause to believe said defendant to be guilty thereof, and the said offence being bailable by said justice, he did thereupon order the said defendant do find sufficient bail in the sum of ten hundred dollars to answer to any indictment to be preferred against him for said offence: Now, therefor, the condition of this recognizance is such that if the above named William Nambe, alias Lambe, shall personally appear at the next court of General session, to be held in said city and county on the first Monday of August next, to answer any indictment that may be preferred against him for said offense and abide the order of the said court and not depart therefrom without leave, then this recognizance to be void otherwise to remain in full force.

WILLIAM LAMBE
WILLIAM PORKOUSKY.

Taken and acknowledged before me this day and year aforesaid.

J. BOGART, Jr.
Police Justice.

CITY AND COUNTY OF NEW YORK, SS.:

Joseph Porkousky, the within named bail, being duly sworn, says that he is a householder in said city, and is worth ten hundred dollars over and above the amount of all his debts and liabilities, and that his property consists of three lots of land in Morrisaina, valued at fifteen hundred dollars, and stock in trade insured for two thousand dollars in the City Insurance Office in this City.

JOSEPH PORKOUSKY.

Sworn before me this 28th day of July, 1855.

A. BOGART Jr. Police Justice.

And then and there after such recognizance being taken by him did discharge from custody the said William Nambe, otherwise called William Lambe, he, the said Abraham Bogart, Jr. then and there, well knowing that the said William Nambe, otherwise called William Lambe, then and there stood committed, as aforesaid by the said James M. Smith, Jr. Esq. recorder, as aforesaid, and that he, the said Abraham Bogart, Jr. was not the committing Magistrate and then and there well knowing that no notice of the application to bail said William Nambe, otherwise called William Lambe, had been given to the district Attorney of the city and county of New York, and that the proofs upon which said commitment was founded had not been presented to him, the said Abraham Bogart, Jr. police justice, as aforesaid, upon said application to bail. And the jurors aforesaid do say that notice of the application to bail said William Nambe, otherwise called William Lambe. had not been given to the district attorney of the city and county of New York,

and that the proofs upon which the commitment was founded had not been presented to the said Abraham Bogart, Jr. police justice as aforesaid, upon said application to bail.

Wherefore the jurors aforesaid upon their oaths aforesaid, do say that the said Abraham Bogart, Jr: police justice, as aforesaid did willfully, maliciously, unlawfully and corruptly, an act prohibited by law, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity

A. OAKEY HALL, District Attorney.<sup>2</sup>

[2. People v. Bogart, 3 Park Cr. R. (N. Y.) 144. The above form was used in this case for a misdemeanor in wilfully admitting a prisoner to bail in the city of New York without notice to the district attorney in a case in which the defendant was not the committing magistrate.]

### FORM 2.

#### Arson.

COURT OF GENERAL SESSIONS OF THE PEACE, In and for the County of New York.

The People of the State of New York against Frederick Wagner.

The grand jury of the county of New York by this indictment accuse Frederick Wagner of the crime of arson in the first degree, committed as follows:

The said Frederick Wagner, late of the twelfth ward of the Borough of Manhattan, of the city of New York, in the county of New York aforesaid, on the thirtieth day of January in the year of our Lord one thousand nine hundred and one, at the ward, borough and county aforesaid, in the night time of said day, a certain dwelling house of one Stephen Kiel there situate, there being then and there within the said dwelling house some human being, feloniously, wilfully and maliciously did set on fire and burn, against the form of the statute in such case made and provided and against the peace of the people of the State of New York and their dignity.

Second Count.

And the grand jury aforesaid, by this indictment, further accuse the said Frederick Wagner of the crime of arson in the first degree, committed as follows:

The said Frederick Wagner, late of the ward, borough and county aforesaid, to wit, on the day and in the year aforesaid, at the ward, borough and county aforesaid, in the night time of said day, a certain dwelling house, of a certain person, whose name is to the grand jury aforesaid unknown, there situate, there being then and there within the said dwelling house some human being, feloniously, wilfully and maliciously did set on fire and burn,

against the form of the statute in such case made and provided and against the peace of the people of the State of New York and their dignity.

EUGENE PHILBIN,
District Attorney.3

[3. In People v. Wagner, 180 N. Y. 58, 72 N. E. 577, a judgment of conviction on the above indiciment was affirmed.]

## FORM 3.

#### Arson.

CITY AND COUNTY OF NEW YORK, SS..

The jurors of the People of the State of New York, in and for the body of the city and county of New York, upon their oath, present:

That Francis Didieu, late of the Fifth Ward of the City of New York, in the County of New York, aforesaid, on the Twenty-first day of March, in the year of our Lord, one thousand eight hundred and fifty-eight, at the Ward, City and County aforesaid, with force and arms, in the night time of the said day, a certain dwelling-house, of one Amelia Asselin, then and there situate (there being then and there within the said dwelling-house, some human being), feloniously, willfully, and maliciously, did set fire to, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

PETER D. SWEENY,
District Attorney.4

[4. Didieu v. People, 4 Park. Cr. R. (N. Y.) 593. The above form was used in this case in indicting a person for arson in the first degree.]

## FORM 4.

### Assault and Battery.

The State of Alabama, Circuit Court for Tuskaloosa county, Fall Term, 1836, The grand jurors for the State of Alabama, elected, impaneled, sworn, and charged to inquire for the body of Tuskaloosa county, upon their oath, present, that Zachariah Middleton, late of said county, in the county aforesaid, on the 26th day of July in the year of our Lord, 1836, with force and arms, at ——, in the county aforesaid, in and upon one Nimrod Freeman, in the peace of God, and the said State, then and there being did make an assault, and him the said Nimrod Freeman, then and there did beat, wound and ill treat, and other wrongs to the said Nimrod Freeman, then and there did, to the great damage of him, the said Nimrod Freeman; and

against the peace and dignity of the State of Alabama. A.B. Meek, Attorney General of the State of Alabama. John Thomas, foreman of the grand jury, endorsed a true bill.<sup>5</sup>

[5. State v. Middleton, 5 Port. (Ala.) 485.]

### FORM 5.

#### Assault and Battery.

WASHINGTON COUNTY, SS.:

The jurors of the people of the state of New York of the body of the county of Washington, to wit, Emezer McMurray, &c., good and lawful men of the body aforesaid, then and there sworn and charged in inquire for the people of the said body, upon their oath present: That Joel W. Holcomb, James Woodard, Henry Loomis and Charles Pardo, late of Whitehall, in said county of Wasington, on the twenty-ninth day of May, in the year of our Lord one thousand eight hundred and fifty-five, at the said town of Whitehall and county of Washington, in and upon one Henry H. Knight, then being one of the constables of said county in the peace of God and of the said people, then and there being, and in the due execution of his said office, then and there also being, did make an assault, and him the said Henry H. Knight, then and there did beat, wound and ill treat, and the due execution of his said office, did then and there, with force and arms, resist, hinder and prevent, contrary to the statute in that case made and provided, and against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Florus D. Meacham, Esquire, was a justice of the peace, in and for the county of Washington at the town of Whitehall, on the said twentyninth day of May, in the year of our Lord, one thousand eight hundred and fifty-five, that on the said twenty-ninth day of May, in the year of our Lord, one thousand eight hundred and fifty-five, at said town and county, the said Meacham, as a justice of the peace aforesaid, duly issued a certain process called a search warrant, subscribed with his name directed to any constable of said county and commanding them in the name of the people of the state of New York, to search a certain barn in said town of Whitehall which was in said warrant particularly described, in the day time for certain personal property, in said warrant particularly set forth and described, belonging to one Alwyn Martin and one Moses T. Clough, which property had been stolen and feloniously taken, and was then concealed in said barn, and said stolen property to bring before said justice of the peace, all of which will by said warrant, more fully and at large appear, that one Henry H. Knight, then and there, was a constable in and for said county, at Whitehall in said county, that said process was duly delivered to him for execution at the time

and place aforesaid, that said constable then and there proceeded to the due execution thereof, and was at and about the searching said barn, in the day time for said stolen property, to take the same before said justice, as by said warrant he was commanded; and on the day and at the place last aforesaid, Joel W. Holcomb, James Woodard, Henry Loomis and Charles Pardo, in and upon the said Henry H. Knight, then and there being in the due execution of said process, did make an assault, and the execution of said process did then and there, with force and arms, maliciously and wilfully resist, and him the said Henry H. Knight, did then and there from the execution of said process, hinder and prevent, and the said stolen property did then and there, with force and arms violently and unlawfully, from the custody and possession of him the said Henry H. Knight, receive and take away, contrary to the statute in that case made and provided and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Joel W. Holcomb, James Woodard, Henry Loomis and Charles Pardo, late of Whitehall, in said county, on the twenty-ninth day of May, in the year of our Lord, one thousand eight hundred and fifty-five, at the said town of Whitehall and county of Washington, with force and arms, did unlawfully, riotously and routously assemble together to disturb the peace, and being so assembled together, in and upon one Henry H. Knight, then and there being one of the constables of the said county of Washington, in the due and lawful discharge of the duties of his office as constable of said county being in the service of a lawful process, to any constable of said county directed and by him then and there had and held for execution as such constable, commanding him to search certain premises in said town and county, for certain stolen property, and the same to bring before the Magistrate issuing said process; which place and property was, in said process, particularly described and set forth, said process having been issued by one F. D. Meacham, a justice of the peace in and for said county, at said town of Whitehall, and having due authority and power to issue the same, did make an assault, and riotously and routously him, the said Henry H. Knight, did resist, hinder and obstruct in the discharge of the duties of his office of constable, and the execution of said process, and the place which by said process said Knight was commanding to search, did with force and arms, unlawfully hinder and prevent from searching, and the said stolen property did prevent and hinder from being taken before the Magistrate issuing said process, as by the command thereof said constable was directed.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Joel W. Holcomb, James Woodard, Henry Loomis and Charles Pardo, late of Whitehall, in said county of Washington, on the twenty-ninth day of May, in the year of our Lord, one thousand eight hundred and fifty-five, with force and arms, at said town of Whitehall and county of Washington, the execution of a certain process called a search warrant, in due form of law issued

by an officer having full authority and jurisdiction to issue the same and then and there had and held by one Henry H. Knight, then and there being a constable in and for said county, for execution, did resist, and the execution thereof did then and there prevent, hinder and obstruct, contrary to the statute in that case made and provided, and against the peace of the people of the State of New York, and their dignity.

JOSEPH POTTER, District Attorney.6

[6. The People v. Holcomb, 3 Park. Cr. R. (N. Y.) 656. Form for an assault and battery committed on an officer while engaged in the execution of his office, with a count for riotously resisting the execution of process and a count for resisting the execution of a search warrant under N. Y. Act of 1845, ch. 69, § 17.]

## FORM 6.

### Assault and Battery.

CITY AND COUNTY OF NEW YORK, SS.:

The jurors of the people of the state of New York, in and for the city and county of New York, upon their oath, present, that John Moore, late of the first ward of the city of New York, in the county of New York aforesaid. laborer; John Miller, late of the same place, laborer; John Lowry, late of the same place, laborer, and Henry Bush, late of the same place, laborer, on the 12th day of July, in the year of our Lord one thousand eight hundred and twenty-four, at the eighth ward of the city of New York, in the county of New York aforesaid, in and upon the body of James Murney, in the peace of God, and of the said people, then and there being, with force and arms, did make an assault, and him the said James did then and there beat, wound, and ill treat, and other wrongs and injuries to the said James, then and there did, to the great damage of the said James, to the evil example of all others in like case offending, and against the peace of the people of the State of New York, and their dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said John, John, John, and Henry afterwards, to wit, on the same day and year aforesaid, in and upon the body of the said James, in the peace of God, and of the said people, then and there being, with force and arms, did make another assault, and him the said James did then and there beat, wound and ill treat, and other wrongs and injuries to the said James then and there did to the great damage of the said James, to the evil example of all others, in like case offending, and against the peace of the people of the state of New York, and their dignity.

> MAXWELL, District Attorney.7

[7. People v. Moore, 3 Wheeler's Cr. Case (N. Y.) 82.

## FORM 7.

## Assault and Battery.

STATE OF VERMONT, ADDISON COUNTY, SS.:

Be it remembered, that, at a term of the County Court, begun and holden at Middlebury, within and for said county of Addison, on the second Tuesday of June, A. D. 1843: The grand jurors within and for the body of the county of Addison, now here in court duly impaneled and sworn, upon their oath present, that William P. Hooker, of Middlebury aforesaid, at Middlebury aforesaid, on the seventh day of November, in the year of our Lord one thousand eight hundred and forty-two, with force and arms, in and upon one Adnah Smith, in the peace of God and of this State then and there being, and then being sheriff of said county of Addison, and in the due execution of his said office, then and there did make an assault, and him, the said Adnah Smith, so being in the due execution of his said office aforesaid, then and there did hinder and impede, and then and there did beat, wound and ill treat, and other wrongs to the said Adnah Smith then and there did, to the great damage of the said Adnah Smith and against the peace and the dignity of the State.

And the grand jurors aforesaid, on their oaths as aforesaid, do further present, that the said William P. Hooker, at Middlebury aforesaid, on the seventh day of November, in the year of our Lord one thousand eight hundred and forty-two, with force and arms, wilfully and knowingly did impede and hinder a civil officer, under the authority of this State, in the execution of his office, to wit, Adnah Smith, sheriff of the county of Addison aforesaid, in the peace of God and this State then and there being, in then and there serving and attempting to serve and execute a legal writ of execution, to wit, a pluries writ of execution, regularly issued on a judgment rendered by the honorable County Court in and for said county of Addison, at the term of said court begun and holden at Middlebury, in and for said county of Addison, on the second Tuesday of June, A. D. 1842, said execution dated the 27th day of September, A. D. 1842, and signed by Samuel Swift, clerk of said court, and directed to any sheriff or constable in the State, and made returnable in sixty days from the date thereof, whereby, after reciting that Harry Goodrich of said Middlebury, by the consideration of the County Court begun and holden at Middlebury, in and for said county of Addson, on the second Tuesday of June, A. D. 1842, recovered judgment against the said William P. Hooker and one Charles Hooker in an action of trespass (the cause of which action it was adjudged by said court arose from the wilful and malicious act of the defendants), in the sum of three hundred and fortyone dollars and fifty-six cents, damages, and for the sum of thirty-two dollars and seventy cents, costs of suit, whereof execution remains to be done for the sum of \$307.70, said officer, as often before commanded, is therefore, by virtue of said writ of execution by the

authority of the State of Vermont, commanded to cause to be levied, of the goods, chattels, or estate of the said William P. Hooker and Charles Hooker, said sum of \$307.70, with 25 cents more for said writ of execution and 50 cents for two others, and, for want of the goods and chattels of said William P. and Charles, shown or to be found by said officer within his precinct, commanding him to take the bodies of said William P. Hooker and Charles Hooker, and them commit to the keeper of the common jail in Middlebury, in said county, within said prison, which said writ of execution, so duly issued as aforesaid, in full life, and in no way satisfied, paid, or discharged, was, on the 6th day of October, A. D. 1842, delivered to said Adnah Smith, sheriff as aforesaid, to serve and return, and afterwards, to wit, on the seventh day of November, A. D. 1842, at Middlebury aforesaid, the said Adnah Smith, then being sheriff as aforesaid, for want of the goods, chattels, or lands of the said William P. and Charles, shown him or to be found within his precinct, whereon to levy said writ of execution, attempted to serve and execute said writ of execution, as he was therein commanded, by arresting the body of said William P. Hooker; and the said William P. Hooker then and there unlawfully and wickedly intending to impede and hinder the said Adnah Smith in the execution of his said office, and well knowing that said Adnah Smith was sheriff of the county of Addison as aforesaid, and that said Adnah Smith then and there had said writ of execution, so duly issued and in full force as aforesaid, to serve and execute, and was then and there attempting to serve and execute said writ of execution, did, with force and arms, then and there impede and hinder the said Adnah Smith, sheriff as aforesaid, in attempting to serve and execute said writ of execution, in the execution of his said office, by beating and bruising the said Adnah Smith with a large and heavy bludgeon on his head, shoulders and arms, to the great damage of the said Adnah Smith, to the great hindrance and obstruction of justice, and contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the State.8

[8. State v. Hooker, 17 Vt. 659. The assault in this case was committed upon a sheriff.]

#### FORM 8.

#### Assault with Intent to Kill.

The grand jurors of the State of Indiana, in and for the county of Rush, good and lawful men, duly and legally impanelled, sworn and charged in the Rush Circuit Court, at the March term, 1877, to inquire in and for the body of said county, in the name and by the authority of the State of Indiana, upon their oath, present and charge, that on the 18th day of January, 1877, and in the county of Rush and State of Indiana, William A. Jones, in and upon one Orlando B. Scobey, did then and there unlawfully, feloniously, pur-

posely and with premeditated malice, make an assault, and then and there, at and against, and in contact with, the said Orlando B. Scobey did feloniously, purposely and with premeditated malice, shoot a certain pistol, then and there loaded with gunpowder and leaden balls, which he, the said William A. Jones then and there in his hands had and held, with the intent then and there him, the said Orlando B. Scobey, feloniously, purposely and with premeditated malice, to kill and murder.9

[9. Jones v. State, 60 Ind. 240, holding that the above indictment was not open to the objection of duplicity.]

## FORM 9.

### Assault with Intent to Kill.

SARATOGA COUNTY, SS.:

The Jurors of the People of the State of New York, in and for the body of the county aforesaid, to wit: Lawrence W. Bristol, &c., &c., good and lawful men of the county aforesaid then and there sworn and charged to inquire for the said People for the body of the county aforesaid, upon their oaths present: That Daniel O'Leary, late of the village of Waterford, in the county of Saratoga aforesaid, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and fifty-seven, with force and arms, at the village of Waterford, in the county of Saratoga aforesaid, in and upon one Margaret Collins then and there being, feloniously did make an assault, and her, the said Margaret Collins, with a certain deadly weapon, commonly called a cleaver, which the said Daniel O'Leary in his right hand then and there had and held feloniously, did beat, strike, and cut, and wound, with intent her, the said Margaret Collins, then and there feloniously and wilfully to kill, and other wrongs to the said Margaret Collins, then and there did to the great damage of the said Margaret Collins, against the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, in their oath aforesaid, do further present, that the said Daniel O'Leary, late of the town and village of Waterford, in the county of Saratoga, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and fifty-seven, with force and arms at the village and county aforesaid, in and upon Margaret Collins, then and there being, feloniously did make an assault and her, the said Margaret Collins, with a certain deadly weapon commonly called a cleaver, which he, the said Daniel O'Leary, in both his right hand then and there had and held feloniously, did beat, in both his hands then and there had and held, feloniously did beat, strike, and cut, and wound, with intent her, the said Margaret Collins, then and there feloniously and wilfully to kill, and other wrongs to

the said Margaret Collins then and there did, to the great damage of the said Margaret Collins, and against the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity. And the jurors aforesaid, on their oath aforesaid, do further present, that the said Daniel O'Leary, on the said twenty-second day of September, in the year last aforesaid, with force and arms, at the village and county aforesaid, in and upon the said Margaret Collins, then and there being, feloniously did make another assault, and her, the said Margaret Collins, with a certain cleaver, which he, the said Daniel O'Leary, in both of his hands then and there had and held the said cleaver, being a deadly weapon, feloniously did beat, strike, cut, and wound, with intent her, the said Margaret Collins, then and there feloniously and wilfully to maim, against the form the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

JOHN O. MOTT, District Attorney.<sup>10</sup>

[10. O'Leary v. The People, 4 Park. Crim. Rep. (N. Y.) 187. Form for an assault and battery with intent to kill, with a count charging an intent to maim.]

### FORM 10.

#### Assault with Intent to Kill.

STATE OF ILLINOIS, WAYNE COUNTY, SS.:

The grand jurors chosen, selected and sworn, in and for the county of Wayne, in the name, and by the authority of the people of the State of Illinois, upon their oaths present that Absalom Nixon, late of the county aforesaid, laborer, on the twenty-third day of October, in the year of our Lord one thousand eight hundred and thirty-eight, with force and arms, at and in the county aforesaid, in and upon one Adam, a man of color, then and there being a deformed person, and by reason of his being such deformed person being unable to walk or otherwise move himself from place to place and also then and there being deficient in voice, so as to be unable to call aloud, and in the peace of God, and of the people of the State of Illinois, then and there also being, unlawfully did make an assault, and then and there forced and threw the said Adam from a certain wagon, in which he, the said Adam, then and there was, to and upon the ground, the said ground then and there being frozen and very cold, and then and there did force and compel the said Adam (so being such deformed person as aforesaid and also by reason of his being such deformed person, being unable to move himself from place to place as aforesaid, and also, being deficient in voice, so as to be unable to call aloud as aforesaid), then and there to lie upon the ground so being

frozen and very cold as aforesaid, and then and there did abandon and leave him, the said Adam, lying on the ground as aforesaid, to the great pain and torture of the said Adam, and to the great damage and impoverishment of his health and strength of body, with intent him, the said Adam, by the means aforesaid, then and there feloniously, wilfully and of his malice aforethought, to kill and murder and other wrongs to him, the said Adam, then and there did to the great damage of him, the said Adam, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Illinois.

G. B. SHELLEDY, State's Attorney.<sup>11</sup>

[11. Nixon v. People, 3 Ill. 267. The above form was used in indicting one for an assault upon a deformed person who was unable to walk or move himself.]

### FORM 11.

### Attempting Suicide.

CENTRAL CRIMINAL COURT, TO WIT.

The jurors for our Lady the Queen upon their oath present, that Marian. the wife of Henry Thomas Johnson, late of the parish of St. Mary-le-bow, in London, and within the jurisdiction of the said court, not having the fear of God before her eyes, and being moved and seduced by the instigation of the devil, heretofore, to wit, on the 18th day of July, A. D. 1851, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully and wilfully did cast and throw herself from and off a certain steamboat called The Bee, then and there being propelled along the waters of a certain river there, called the Thames, into the waters of the said river, with the wicked intent and purpose of then and there feloniously, wilfully and of her malice aforethought, choking, suffocating, drowning, and murdering herself in and by the waters aforesaid, and so the jurors aforesaid, upon their oath aforesaid, do say that the said M. J., on the day and year aforesaid, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, wilfully and wickedly did attempt and endeavour feloniously, wilfully and of her malice aforethought, to kill and murder herself in manner aforesaid, to the great displeasure of Almighty God, in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.12

[12. V Cox. Cr. Cas. Appendix XCII.]

### FORM 12.

### Bawdy House-Keeping of.

NORTH CAROLINA, ROWAN COUNTY, SS.—SUPERIOR COURT OF LAW, FALL TERM, 1844.

The jurors for the State upon their oath present, that Augusta Ann Evans, late of the said county, spinster, on the 10th day of August, 1843, and thence continually to the time of the finding of this bill, and before, in the said county of Rowan, with force and arms unlawfully did keep and maintain a certain ill-governed and disorderly house, and in the said house then, and on said other days there, did procure and cause and permit persons of lewd conversation and demeanor to frequent and come together, and then and on the said other days, there to remain, drinking, whoring, cursing, swearing and misbehaving themselves, to the great damage and common nuisance of all the good citizens of the said State there inhabiting and living and passing, to the evil example of all others in the like case offending, and against the peace and dignity of the State. 13

[13. The State v. Augusta A. Evans, 5 Ired. L. (N. C.) 603. In this case the question of the sufficiency of the indictment was raised on a motion to arrest, but the court reversed the judgment on the ground of insufficiency of evidence and declared that therefore the question of the sufficiency of the indictment on such motion did not present itself to them.]

## FORM 13.

#### Bigamy.

CITY AND COUNTY OF NEW YORK, SS.:

The jurors of the People of the State of New York, in and for the body of the city and county of New York, upon their oath, present: That John J. Hayes, late of the first ward of the city of New York, in the county of New York, aforesaid, on the third day of February, in the year of our Lord one thousand eight hundred and forty-five, did marry one Sarah E. Blair, and her, the said Sarah E. Blair, did then and there have for his wife, and that the said John J. Hayes afterwards, to wit, on the thirteenth day of September, in the year of our Lord one thousand eight hundred and sixty, at the ward, city and county aforesaid, while he was married to the said Sarah, with force and arms did feloniously marry and take as his wife one Jane White, and to the said Jane White was then and there married, the said Sarah E. Blair being then and there living and in full life, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

NELSON J. WATERBURY,

District Attorney.14

[14. Hayes v. The People, 5 Park. Cr. R. (N. Y.) 325.]

## FORM 14.

### Bribery.

STATE OF MAINE, KNOX, SS.:

At the Supreme Judicial Court, begun and holden at Rockland, within and for the county of Knox, on the second Tuesday of March, in the year of our Lord one thousand eight hundred and eight-one.

The jurors for said State, upon their oath present, that a meeting of the inhabitants qualified to vote, of ward one in Rockland, in the county of Knox, for the election of one alderman, and three common councilmen, on the eighth day of March, in the year of our Lord one thousand eight hundred and eighty-one at said Rockland, was then and there duly holden. And the jurors aforesaid upon their oath aforesaid do further present that one Augustus Montgomery was then and there a qualified voter in this State, to wit, in ward one, in said Rockland, in the county aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present that Charles A. Jackson, of Rockland, in said county of Knox, did then and there at the said election, unlawfully and wilfully attempt to influence the said Augustus Montgomery, so being a qualified voter in this State as aforesaid to give his, the said Augustus Montgomery's ballot, in said election then and there duly holden, by then and there offering and paying him the said Augustus Montgomery, the sum of two dollars in lawful money, against the peace of said State.

A true bill.

ROBERT LONG, Foreman, pro tem.15

[15. State v. Jackson, 73 Me. 91. Form used in this case for bribing a qualified voter.]

## FORM 15.

#### Bribery.

(STATE OF MAINE, CUMBERLAND, SS.:

At the ——— Court, begun and holden at ———, within and for the county of Cumberland, on the ———— day of ————, in the year of our Lord one thousand eight hundred and ————.) 16

[16. Omitted in form given in report of case.]

The grand jurors for said State upon their oath present that Dana H. Miles of Portland, in the county of Cumberland, on the fourth day of June, in the year of our Lord one thousand eight hundred and ninety-four, at said Portland, was a police officer of said Portland, duly and legally appointed and authorized to discharge the duties of that office, that as such police officer.

it was then and there the duty of said Dana H. Miles to arrest one John Murphy, the younger of that name, who was then and there, on said fourth day of June, unlawfully concerned in a certain lottery, scheme and device of chance not authorized by law in said State, by then and there having in his possession, with intent to sell and dispose of the same, certain certificates, tickets, shares and interests in said lottery, scheme and device of chance, as he, the said Dana H. Miles, then and there well knew; nevertheless, the said Dana H. Miles, not regarding the duties of his office as aforesaid, but perverting the trust reposed in him, and contriving and intending the citizens of this State for the private gain of him, the said Dana H. Miles, to oppress and impoverish and the due execution of justice as much as in him lay to hinder, obstruct and destroy, on said fourth day of June, in said Portland, under color of his said office as a police officer as aforesaid, a certain sum of money, to wit, the sum of five dollars, for not arresting said John Murphy, the younger of that name, and for not interfering with said John Murphy. the younger of that name, in the prosecution of said business of being unlawfully concerned in a certain lottery, scheme and device of chance not authorized by law in said State as aforesaid, the said Dana H. Miles from the said John Murphy, the younger of that name, unlawfully, unjustly and extorsively did accept, receive and have, against the duties of his said office, to the great hindrance of justice and against the peace of said State.

(The second count alleged the same offense to have been committed on the eleventh day of the same month.)

that said Dana H. Miles afterwards, to wit, on (Third Count) the tenth day of June, in the year of our Lord one thousand eight hundred and ninety-four, at said Portland, was an officer having power to serve criminal process within said Portland, to wit, a police officer of said Portland, duly and legally appointed and authorized to discharge the duties of that office; that by virtue of his authority as such police officer, he then and there seized in a certain tenement situated on the northerly side of Fore street, so called, in said Portland, certain intoxicating liquors, a more particular description of which said intoxicating liquors is to the grand jurors unknown, which said intoxicating liquors were then and there kept and deposited in said tenement and intended for illegal sale in said State, by one Lewis Levi, as he, the said Dana H. Miles, then and there well knew; that it was then and there the duty of said Dana H. Miles as such officer, to institute proceedings against said Lewis Levi for having violated as aforesaid, the laws relative to the illegal sale and the illegal keeping of intoxicating liquors; nevertheless, the said Dana H. Miles, not regarding the duties of his office as aforesaid, but perverting the trust reposed in him and contriving and intending the citizens of this State for the private gain of him, the said Dana H. Miles, to oppress and impoverish and the due execution of justice as much as in him lay to hinder, obstruct and destroy, on said tenth day of June, at said Portland, under color of his said office as a police officer as aforesaid, a

certain sum of money, to wit, the sum of ten dollars, for not instituting proceedings against him, the said Lewis Levi, for having violated the laws against the illegal sale and the illegal keeping of intoxicating liquors as aforesaid, he, the said Dana H. Miles, from the said Lewis Levi did then and there unlawfully, unjustly and extorsively accept, receive and have, against the duties of his said office, to the great hindrance of justice and against the peace of said State.

(Fourth Count) . . . that said Dana H. Miles afterwards, to wit, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-four, at said Portland, was an officer having power to serve criminal process within said Portland, to wit, a police officer of said Portland, duly and legally appointed and authorized to discharge the duties of that office; that he, the said Dana H. Miles, did then and there on said fourteenth day of July, find in a certain tenement situated on the Northerly side of Federal street, so called, in said Portland, certain intoxicating liquors, a more particular description of which said intoxicating liquors is to the grand jurors unknown, which said intoxicating liquors were then and there kept and deposited in said tenement and intended for illegal sale in said State; that it was then and there the duty of said Dana H. Miles as such police officer to endeavor to ascertain the owner and keeper of said intoxicating liquors so then and there kept and deposited as aforesaid, and to further endeavor to ascertain the person or persons intending to unlawfully sell such intoxicating liquors so then and there kept and deposited as aforesaid, and it was then and there the duty of said Dana H. Miles as such police officer to institute proceedings against the owner and keeper of said intoxicating liquors so then and there kept and deposited as aforesaid, and it was then and there the duty of said Dana H. Miles as such police officer to institute proceedings against the person or persons intending to unlawfully sell such intoxicating liquors so then and there kept and deposited as aforesaid; nevertheless, the said Dana H. Miles, not regarding the duties of his office as aforesaid, but perverting the trust reposed in him and contriving and intending the citizens of the State for the private gain of him, the said Dana H. Miles, to oppress and impoverish and the due execution of justice as much as in him lay to hinder, obstruct and destroy, on said fourteenth day of July, at said Portland, under color of his said office as a police officer as aforesaid, a certain sum of money, to wit, the sum of twenty-five dollars, for not endeavoring to ascertain the owner and keeper of said intoxicating liquors so then and there kept and deposited as aforesaid, and for not endeavoring to ascertain the person or persons intending to unlawfully sell said intoxicating liquors so then and there kept and deposited as aforesaid, and for not instituting proceedings against the owner and keeper of said intoxicating liquors so then and there kept and deposited as aforesaid, and for not then and there instituting proceedings against the person or persons intending to unlawfully sell such intoxicating liquors so then and there kept and deposited as afore-

said, the said Dana H. Miles from one William H. Lord did unlawfully, unjustly and extorsively accept, receive and have, against the duties of his said office, to the great hindrance of justice and against the peace of said State.

(Fifth Count) . . . that the said Dana H. Miles afterwards, to wit, on the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and ninety-four, was an officer having power to serve criminal process within said Portland, to wit, a police officer of said Portland duly and legally appointed and authorized to discharge the duties of that office; that by virtue of his authority as such police officer, he then and there seized in a certain tenement situated on the easterly side of Monument square, so called, in said Portland, certain intoxicating liquors, a more particular description of which said intoxicating liquors is to the grand jurors unknown, which said intoxicating liquors were then and there kept and deposited and intended for unlawful sale within said State by one Henry A. Harding, as he, the said Dana H. Miles, then and there well knew; that it was then and there the duty of said Dana H. Miles, as such officer, to institute proceedings against the said Henry A. Harding for having violated as aforesaid the laws relative to the illegal sale and the illegal keeping of intoxicating liquors; nevertheless, the said Dana H. Miles, not regarding the duties of his office as aforesaid, but perverting the trust reposed in him and contriving and intending the citizens of this State for the private gain of him, the said Dana H. Miles, to oppress and impoverish and the due execution of justice as much as in him lay to hinder, obstruct and destroy, on said twenty-seventh day of September, at said Portland, under color of his said office as a police officer as aforesaid, a certain sum of money, to wit, the sum of ten dollars, as a consideration for using his influence and endeavoring in divers other ways to have such proceedings to be so instituted against said Henry Harding, dismissed, he, the said Dana H. Miles, from said Henry A. Harding did unlawfully, unjustly and extorsively accept, receive and have, against the duties of his said office, to the great hindrance of justice and against the peace of said State.17

[17. State v. Miles, 89 Me. 142, 143. Form used for indicting police official for accepting bribe.]

## FORM 16.

#### Bribery.

The grand jury of the city and county of New York, by this indictment accuse Jacob Sharp, James A. Richmond, James W. Foshay, Thomas B. Kerr, John Keenan, Robert E. De Lacey, and William H. Maloney of the crime of

bribery, committed as follows: Heretofore, to wit; on the thirtieth day of August, in year of our Lord one thousand eight hundred and eighty-four, at the city of New York, in the county of New York aforesaid, a certain petition and application of the Broadway Surface Railroad Company, a corporation duly organized and incorporated under and by virtue of the laws of the State of New York before then duly made and presented to the common council of the city of New York, praying and making application to the said common council for its consent and permission to construct, maintain, operate and use a street surface railroad for public use in the conveyance of persons and property in cars upon and along the surface of certain streets, avenues and highways in the said city, together with the necessary connections, switches, turnouts, turntables, sidings and suitable stands for the convenient working of the said road, was duly pending before and under the consideration of the said common council. And the said petition and application having been so as aforesaid made and presented to the said common council and being so pending and under its consideration as aforesaid, the said Jacob Sharp, James A. Richmond, James W. Foshay, Thomas B. Kerr, John Keenan, Robert E. De Lacey, and William H. Moloney, all late of the city and county of New York aforesaid, well knowing the premises afterwards, to wit, on the said thirtieth day of August, in the year aforesaid and whilst the said petition and application was yet pending before and under the consideration of the said common council, at the city and county aforesaid, with force and arms, unlawfully, wickedly and corruptly did feloniously give and offer and cause to be given and offered to one Ludolph A. Fullgraff, who was then and there a public officer and a person executing the functions of a public office, to wit, an alderman and member of the board of aldermen of the city of New York, and as such being then and there a member of the common council aforesaid, the sum of twenty thousand dollars in money and a promise and agreement therefore with intent in so doing to influence him, the said Ludolph A. Fullgraff, in respect to his acts, vote and proceeding in the exercise of his powers and functions as such member of the common council aforesaid upon and concerning the said petition and application of the said Broadway Surface Railroad Company so pending before and under the consideration of the said common council as aforesaid so that the acts, vote and proceeding of the said Ludolph A. Fullgraff as such number of the common council aforesaid upon and concerning the said petition and application should be in favor of the granting and giving by the said common council of the consent and permission so as aforesaid in and by the said petition and application prayed and applied for; against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.18

[18. People v. Sharp, 5 N. Y. Cr. R. 389, 391. Form used in this case for indicting persons for bribery of alderman.]

## FORM 17.

### Bribery.

STATE OF WEST VIRGINIA, WYOMING COUNTY, TO WIT:

In the Circuit Court said county.

The jurors of the State of West Virginia in and for the body of the county of Wyoming, and now attending the said court, upon their oath present that on the 28th day of January, in the year 1876, a certain cause in which Boyd E. Lusk was plaintiff and Drury Halsey was defendant, was pending and undetermined in the County Court of said county and at the January term of said court, on the 28th day of January, 1876, by agreement of parties the matters in controversy in said cause were submitted to the arbitration and award of Martin G. Clay, Henry Ellis and Smith Trent, selected and chosen by the parties, and duly qualified according to law to act as such arbitrators; and that on the 29th day of January, 1876, while the said matters of controversy in said cause were before the said arbitrators, the said Boyd E. Lusk in the said county, with the intent to bias the opinion and influence the decision of the said Martin G. Clay, one of the said arbitrators to whom was submitted the matter in controversy in said cause, pending as aforesaid, did then and there unlawfully, wilfully and corruptly, promise to give and offer to pay to him, the said Martin G. Clay as such arbitrator as aforesaid, to prostitute and betray the duties devolving on him as such arbitrator as aforesaid by giving his opinion and deciding the said matters in controversy in said cause then pending before said arbitrators as aforesaid. in favor of the said Boyd E. Lusk, against the peace and dignity of the State.

Upon the evidence of Martin G. Clay, sworn in open court, to give testimony before the grand jury.<sup>19</sup>

[19. State v. Lusk, 16 W. Va. 767. Form used in this case for indicting one for offering to bribe an arbitrator.]

#### FORM 18.

#### Burglary.

In the Circuit Court of the State of Oregon, for the County of Linn: The State of Oregon, Plaintiff, v. Charles Ryan, Defendant.

Charles Ryan is accused by the grand jury of the county of Linn, in the State of Oregon, by this indictment, of the crime of burglary, committed as follows: The said Charles Ryan, on the eighth day of November, A. D. 1887, in the county of Linn, and State of Oregon, then and there being, did then and there feloniously and burglariously break and enter in the night time a dwelling-house, in which there was at that time a human being, namely,

Ella M. Mack, with the intent to commit rape therein, by forcibly breaking an outer door of said dwelling-house; and the said Charles Ryan having so entered said dwelling-house with such intent, did then and there commit an assault upon Ella M. Mack, the person lawfully then in such house. Contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at Albany, in the county of Linn, and State of Oregon, the 15th day of November, A. D. 1887.

GEO. W. BELT,
District Attorney. 20

[20. State v. Ryan, 15 Oreg. 572, holding that an accused could not be convicted of assault with intent to commit rape, under the above indictment.]

## FORM 19.

#### Burglary.

The grand inquest of the Commonwealth of Pennsylvania, inquiring in and for the county of Clarion, upon their respective oaths and affirmations, do present, that J. M. Carson, late of said county, yeoman; James McAbee, late of said county yeoman; William Reath, late of county, yeoman; Bub Gilger, late of said county, yeoman; on the sixth day of January, A. D. 1893, at the county aforesaid, and within the jurisdiction of this court, wilfully and feloniously did break and enter the dwelling-house of M. J. Baker, there situate, with intention the goods, chattels and property of M. J. Baker, in the said dwelling-house, then and there being, then and there feloniously to steal, take and carry away, one range. of the value of eight dollars; one lot of carpets of the value of five dollars; one lot of carpenter tools, of the value of ten dollars; one lot of lumber of the value of forty dollars, the goods, chattels and property of the said M. J. Baker, then and there being found, did then and there the goods, chattels. and property above mentioned, in the said dwelling-house, feloniously steal, take and carry, to the great damage of the said M. J. Baker, contrary to the form of the Act of Assembly, in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the inquest aforesaid, inquiring as aforesaid, upon their oaths and affirmations respectively, as aforesaid, do further present, that J. M. Carson, late of said county, yoeman; James McAbee, late of said county, yeoman; William Reath, late of said county, yeoman; Bub Gilger, late of said county, yeoman, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, did wilfully and maliciously break, injure and destroy a certain window, belonging to the dwelling-house of one M. J. Baker, contrary to the form of the Act of Assembly, in such case

made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.21

[21. Common. v. Carson et al., 166 Pa. St. 179, 180, holding that the first count was defective as a count for burglary at common law, but that it was good under the Pa. Act of April 22, 1863, P. L. 531, prescribing a penalty for breaking and entering a dwelling-house in the day time, and also for wilfully and maliciously entering the same with felonious intent "either by day or by night, with or without breaking."]

### FORM 20.

### Burglary with Intent to Commit Rape.

STATE OF ABKANSAS AGAINST PAT BRADLEY—INDICTMENT FOR BURGLARY.
Bradley County Circuit Court, March Term, A. D. 1878.

The grand jury of Bradley county, in the name and by the authority of the State of Arkansas, accuse Pat. Bradley of the crime of burglary, committed as follows, to wit:

The said Pat. Bradley, in the county aforesaid, on or about 11 o'clock of the night time of the fourteenth day of July, A. D. 1877, did unlawfully, feloniously, and burglariously enter the dwelling house of one E. D. Sled, with the intention to commit a felony, to wit, an assault with intent to commit rape in and upon the body of one Mary J. Sled, a female, the wife of the said E. D. Sled, with intent feloniously to ravish and carnally know the said Mary J. Sled, forcible and against her will, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Arkansas.

J. C. BARROW,

Prosecuting Attorney.22

[22. Bradley v. State, 32 Ark. 704, holding that in an indictment for such an offense it is unnecessary to allege an assault.]

### FORM 21.

### Carrying Weapons.

STATE OF ARKANSAS V. J. S. HELT:

The grand jury of Lincoln county, in the name and by the authority of the State of Arkansas, accuses J. S. Helt of the crime of carrying a weapon, committed as follows, to wit: The said J. S. Helt, in the county and State aforesaid, on the 20th day of April, 1888, did carry a pistol as a weapon contrary

to the statute in such cases made and provided, and against the peace and dignity of the State of Arkansas.<sup>23</sup>

[23. Helt v. State, 52 Ark. 279, 280, holding that where an indictment recites that it was found in the Circuit Court of a county embrasing two judicial districts, without specifying in which district it was found, and it appears from the term at which the indictment was found and the date of the clerk's indorsement upon it when it was received from the grand jury, that it was returned at a time when the court for one of the districts alone could legally be in session, it will be presumed from the indictment itself that it was returned by a grand jury legally empaneled in that district.]

### FORM 22.

#### Concealing Birth of Child.

STATE OF NORTH CABOLINA, BURKE COUNTY—SUPERIOR COURT, SPRING TERM, 1855.

The jurors for the State, upon their oath, present that Lura Stewart, late of the county of Burke, on the first day of March, A. D. 1885, with force and arms at and in the county aforesaid, unlawfully and wilfully did endeavor to conceal the birth of a new born male child, not yet named of her, the said Lura Stewart, by then and there secretly placing and leaving the dead body of said child in a secret place, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

J. S. ADAMS.

Solicitor.24

[24. State v. Stewart, 93 N. C. 539, 540.]

### FORM 23.

### Confidence Game-Obtaining Money by Means of.

STATE OF ILLINOIS, ST. CLAIR COUNTY, SS.:

Of the March Term of the St. Clair Circuit Court, in the year of our Lord 1868.

The grand jurors chosen, selected, and sworn, in and for the county of St. Clair, State of Illinois, upon their oaths present, that Thomas Morton and James Stewart did, on the 18th day of February, in the year of our Lord one thousand eight hundred and sixty-eight, in the county of St. Clair aforesaid, unlawfully and feloniously obtain from one Daniel Hughes thirty dollars, of his money, by means and by use of the confidence game,

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Illinois.

And the jurors aforesaid, in the name and by the authority aforesaid, upon their oaths aforesaid, do further present that Thomas Morton and James Stewart, on the day and year aforesaid, and in the county aforesaid, did unlawfully and feloniously obtain from Daniel Hughes one United States legal tender treasury note, for the payment of ten dollars, and of the value of ten dollars, one bank note for the payment of ten dollars, and of the value of ten dollars, and two bank notes for the payment of five dollars each, and of the value of five dollars each, the personal property then and there of the said Daniel Hughes, by means and by use then and there of the confidence game, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Illinois.

J. B. HAY,

State's Attorney.25

[25. Morton v. People, 47 Ill. 468.]

## FORM 24.

### Conspiracy.

We, the grand jurors of the United States, chosen, selected, and sworn in and for the Northern District of Georgia, upon our oaths, present:

That heretofore, to wit, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and eighty-three, Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory. State Lemmons, Jake Hayes, and E. H. Green, all late of said Northern District of Georgia, did, within the said Northern District of Georgia, and within the jurisdiction of this court, commit the offence of conspiracy, for that the said Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes and E. H. Green did then and there, at the time and place aforesaid, combine, conspire and confederate together, by force, to injure, oppress, threaten, and intimidate Berry Saunders, a person of color and a citizen of the United States of America of African descent, on account of his race, color, and previous condition of servitude, in the full exercise and enjoyment of the right and privilege of suffrage in the election of a lawfully qualified person as a member of the Congress of the United States of America, and because the said Berry Saunders had so exercised the same, and on account of such exercise, which said right and privilege of suffrage was secured to the said Berry Saunders by the Constitution and law of the United States of America, the said Berry Saunders being then and there lawfully entitled to vote in said

election, and having so then and there conspired the said Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes and E. H. Green did unlawfully, feloniously and wilfully beat, bruise, wound and maltreat the said Berry Saunders, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

"Second Count-And the jurors aforesaid, upon their oaths aforesaid, do further present: That heretofore, to wit, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and eighty-three, Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes and E. H. Green, all late of said Northern District of Georgia, within the said Northern District of Georgia and within the jurisdiction of this court, did commit the offence of conspiracy, for that the said Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes and E. H. Green, having then and there conspired together, by force, to injure, oppress, threaten and intimidate Berry Saunders, a person of color and a citizen of the United States of America, of African descent, on account of his race, color, and previous condition of servitude, did then and there unlawfully, wilfully and feloniously go in disguise on the highway, and on the premises of Berry Saunders, with the intent to prevent and hinder his free exercise and enjoyment of the right to vote at an election for a lawfully qualified person as a member of Congress of the United States of America, which said right had then and there been guaranteed to the said Berry Saunders by the Constitution and laws of the United States of America, the said Berry Saunders being then and there lawfully qualified to vote at said election; and having so conspired with intent as aforesaid, the said Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes and E. H. Green did then and there beat, bruise, wound and maltreat the said Berry Saunders, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

EMORY.

Supr. U. S. Atty.

A true bill. Oct. 12th, 1883.

J. C. KIRKPATRICK,

Foreman, 26

[26. Ex parte Yarbrough, 110 U. S. 651, 655, holding that the offense of conspiring to intimidate a person of African descent from voting at an election for a member of Congress, as provided for by §§ 5508, 5520, U. S. Rev. St., was sufficiently described by the above indictment.]

## FORM 25.

#### Conspiracy.

· United States of America, Eastern District of Missouri, ss.:

In the District Court of the United States, for the Eastern District of Missouri. At the November Term of said court, A. D. 1875.

The grand jurors of the United States of America, duly impanelled, sworn, and charged to inquire in and for the Eastern District of Missouri, on their oaths present that Orville E. Babcock and John A. Joyce, late of said district, on the first day of January, in the year of our Lord one thousand eight hundred and seventy-four, at the said district, did conspire, combine, confederate, and agree together among themselves, and with John McDonald, Joseph M. Fitzroy, Alfred Bevis, Edward B. Fraser, Rudolph W. Ulrici, Louis Teuscher, John Busby, Gordon B. Bingham and John W. Bingham, with certain other persons, to the grand jurors aforesaid unknown, to defraud the United States of the internal revenue tax of seventy cents, then and there imposed by law upon each and every proof gallon of a large quantity, to wit, one million proof gallons of distilled spirits, thereafter to be produced at certain distilleries, then and there situated in the city of St. Louis, within said district, to wit, the distillery then and there occupied by the said Alfred Bevis. and Edward B. Fraser, then and there situated at the northeast corner of Barton street and DeKalb street, in said city of St. Louis, and within said district; the distillery then and there occupied by the said Rudolph W. Ulrici, and then and there situated at the southeast corner of Cedar street and Main street in the said city of St. Louis, and within said district; the distillery then and there occupied by the said Louis Tenscher, and then and there situated at Nos. 2808, 2810, 2812, 2814 and 2816, inclusive, North Second street, in said city of St. Louis, and in said district; the distillery then and there occupied by the said John Busby, and then and there situated at the southwest corner of Cass avenue and Eleventh street, in said city of St. Louis, and within said district; the distillery then and there occupied by said Gordon B. Bingham and John W. Bingham, and then and there situated at No. 1313 Papin street, in said city of St. Louis, and within said district.

That afterward, to wit, on the eleventh day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at the Eastern District of Missouri, the said Alfred Bevis and Edward B. Fraser, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy and agreement, so had as aforesaid, did remove from the said distillery situated as aforesaid at the northeast corner of Barton street and DeKalb street, in the said city of St. Louis, to a place other than the distillery warehouse, situated upon and constituting a part of the distillery premises, to wit, to a place to the jurors aforesaid unknown, a large quantity of spirits, to wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents, then and there imposed by law upon each and every

proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax.

That afterward, to wit, on the said fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at the said Eastern District of Missouri, the said Rudolph W. Ulrici, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy and agreement, so had as aforesaid, did remove from the said distillery situated as aforesaid at the southwest corner of Cedar street and Main street, in the said city of St. Louis, to a place other than the distillery warehouse, situated upon and constituting a part of the said distillery premises, to wit, to a place to the jurors aforesaid unknown, a large quantity of spirits, to wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents then and there imposed by law upon each and every proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax.

That afterward, to wit, on the said fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, at the Eastern District of Missouri, the said Louis Teuscher, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy and agreement, so had as aforesaid, did remove from the said distillery, situated as aforesaid at Nos. 2808, 2810, 2812, 2814 and 2816, inclusive, North Second street, in said city of St. Louis, to a place other than a distillery warehouse, situated upon and constituting a part of the said distillery premises, to wit, to a place to the jurors aforesaid unknown, a large quantity of spirits, to wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents, then and there imposed by law upon each and every proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax.

That afterward, to wit, on the said fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at the said Eastern District of Missouri, the said John Busby, in pursuance of and in order to effect, the object of said conspiracy, combination, confederacy and agreement, so had as aforesaid, did remove from the said distillery, situated as aforesaid at the southwest corner of Cass avenue and Eleventh street, in the said city of St. Louis, to a place other than the distillery warehouse, situated upon and constituting a part of the said distillery premises, to wit, to a place to the jurors aforesaid unknown, a large quantity of spirits, to wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents, then and there imposed by law upon each and every proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax.

That afterward, to wit, on the said fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at the said Eastern District of Missouri, the said Gordon B. Bingham and John W. Bingham, in pursuance of, and in order to effect, the object of said conspiracy,

combination, confederacy and agreement, so had as aforesaid, did remove from the said distillery situated as aforesaid at No. 313 Papin street, in the said city of St. Louis, to a place other than the distillery warehouse, situated upon and constituting a part of the said distillery premises, to wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents, then and there imposed by law upon each and every proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax.

That afterward, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and seventy-four, and at the said Eastern District of Missouri, the said John A. Joyce, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy and agreement, so had as aforesaid, did aid and abet in the removal from the said distillery of Alfred Bevis and Edward B. Fraser, to a place to the jurors aforesaid unknown, of a large quantity of distilled spirits, to wit, one thousand proof gallons thereof, upon each and every proof gallon of which said spirits the internal revenue tax of seventy cents then and there imposed by law, had not first been paid, contrary to the form of the statute of the United States in such cases made and provided, and against their peace and dignity.

DAVID P. DYER.

United States Attorney for the Eastern District of Missouri. '27

[27. United States v. Babcock, 3 Dillon C. C. C. 623. Form used in this case for conspiracy to defraud the United States of internal revenue tax.]

# FORM 26.

#### Conspiracy.

DISTRICT OF MINNESOTA, SS.:

The grand jury of the United States of America, within and for said district, on their oath present that heretofore, to wit, on the second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in this district, Edward A. Stevens, Thaddens S. Dickey, Louis E. Strum, and other persons to the grand jurors aforesaid unknown, meditated and devised a scheme to procure false, exaggerated, and fictitious schedules and returns of the population of said city on the first day of June, in the year of our Lord one thousand eight hundred and ninety, to be made and forwarded to the supervisor of the second census district of Minnesota by the several enumerators employed, and to be employed, to take the eleventh census of the United States within said city. That on said second day of June, one Edward J. Davenport was one of the supervisors of census, to wit, the supervisor of census within and for the second supervisor's district of Minnesota, duly appointed, qualified, and acting as such, under and pursuant to the provisions of an act of Congress of the United States, to wit, an act

entitled "An act to provide for taking the eleventh and subsequent censuses;" approved March first, A. D. one thousand eight hundred and eighty-nine, and one Louis A. Strum was an enumerator duly employed, appointed and qualified, and acting as such under and pursuant to the provision of said act, within and for a certain subdivision of and within said census district, to wit, subdivision number 367; he, the said Louis E. Strum, lately before then, to wit, on said second day of June, having taken and subscribed the oath required by (section eight of) said act.

That the said Louis E. Strum on said second day of June had in his custody and possession, as such enumerator divers, to wit, three hundred, blank schedules of the form approved by the Secretary of the Interior to be filled in the course of the enumeration to be by him made, according to the provisions of said act, and being the same blank schedules that had been issued, pursuant to the provisions of said act, from the census office, and to him, the said Louis E. Strum, before then, lately, to wit, on said second day of June, transmitted and delivered by said supervisor of census.

And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in this district, the said Davenport still being and acting as the supervisor of census within and for said census district, and the said Louis E. Strum still being and acting as an enumerator within and for his said subdivision, and still having in his custody and possession as such enumerator the said blank original schedules, the same being of the kind and form known as "schedule No. 1," and relating to and containing inquiries touching and concerning population and social statistics, Edward A. Stevens, Thaddens S. Dickey, and the said Louis E. Strum, yeomen, late of said city, together with other evil disposed persons whose names are as yet to the jurors aforesaid unknown, did unlawfully and maliciously conspire, combine, and confederate together and with each other, in and upon one of said schedules then and there unlawfully. wilfully, and knowingly to put, place, insert, and write the following imaginary, false, and fictitious names of persons, that is to say: Gordon Douglas, Grace Douglas, David Douglas, Belke Douglas, Robert Douglas, Mary J. Douglas, Ann F. Douglas, William Douglas, Andrew Douglas,-in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon, pursuant to the provision of said act, and imaginary, false, pretended and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedule for answers of the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon and required by said act to be answered in and upon said schedule, and the same schedule afterwards, to wit, on said day with said names and said imaginary, false, pretended, and fictitious answers, items of information, particulars, facts and statistics, put, placed, inserted, and written therein in manner and form aforesaid, to wilfully and knowingly duly certify, and have and procure to be duly certi-

fied, in form of law, by him, the said Louis S. Strum, as enumerator, as aforesaid, within and for said subdivision, and the same schedule filled and certified as aforesaid, afterwards, to wit, at said city of Minneapolis on said day, to unlawfully, knowingly, and wilfully forward, with other like schedules, to the said supervisor as his, the said Louis E. Strum's, returns under the provisions of said act, they, the said Edward S. Stevens, Thaddens S. Dickey, and Louis E. Strum, then and there, to wit, when they conspired, combined, and confederated together as aforesaid, well knowing that the said names, answers, items of information, particulars, facts, and statistics, and each and every one of them, were imaginary, pretended, false, and fictitious, and that none of said imaginary, pretended, and fictitious persons were, on the first day of June, in the year of our Lord one thousand eight hundred and ninety, or ever, residents or inhabitants of his, the said Louis E. Strum's, said subdivision; and he, the said Louis E. Strum, not having obtained said names, answers, items of information, particulars, facts, and statistics, or any or either of them, by an inquiry made by him, the said Louis E. Strum, of any one, nor by visit by him, the said Louis E. Strum, personally to any dwelling-house or family in his said subdivision, nor in the course of enumeration or canvass by him, the said Louis E. Strum, of his said subdivision, as they, the said Edward A. Stevens, Thaddens S. Dickey, and Louis E. Strum then and there well knew.

That afterwards, to wit, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in said district, pursuant to said conspiracy, and to promote and effect the object thereof the said Louis E. Strum, he, the said Louis E. Strum, still being and acting then and there as enumerator, as aforesaid, within and for his said subdivision, and still having in his custody and possession as such enumerator, the said schedules, and the said Davenport still being and acting then and there as supervisor of census within and for said second census district, in and upon one of said blank schedules, to wit, the blank schedule last hereinbefore mentioned, did then and there unlawfully, wilfully, and knowingly put, place, insert, and write the several imaginary false and fictitious names aforesaid, in the several blanks left and provided therein for the names of persons respectively to be enumerated thereupon, pursuant to the provisions of said act, and divers imaginary, false, pretended, and fictitious answers, items of information, particulars, facts and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule.

And the jurors aforesaid, upon their oath aforesaid, do say that the said Edward A. Stevens, Thaddens S. Dickey, and Louis E. Strum, then and there, to wit, at the said city of Minneapolis, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, unlawfully and maliciously did conspire, combine, and confederate together and with each.

other to unlawfully, wilfully, and knowingly make the fictitious returns aforesaid, in manner and form aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on the said second day of June in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in this district, the said Davenport, still being and acting as the supervisor of census within and for said census district, and the said Louis E. Strum, still being and acting as an enumerator within and for his said subdivision, and still having in his custody and possession as such enumerator the said blank original schedules, the same being of the kind and form known as "Schedule No. 1," relating to and containing inquiries touching and concerning population and social statistics, Edward A. Stevens, Thaddens S. Dickey, and the said Louis E. Strum, yeomen, late of said city, together with other evil disposed persons whose names are as yet to the jurors aforesaid unknown, did unlawfully and maliciously conspire, combine and confederate together with each other in and upon one of said schedules then and there unlawfully, wilfully, and knowingly to put, place, insert and write the following imaginary, false and fictitious names of persons, that is to say: Ambrose W. Daynes, Mattie F. Daynes, John P. Daynes, William Daynes, Obedia Daynes, Lizzie Daynes, in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon, pursuant to the provisions of said act, and imaginary false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein, concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule, and the same schedule afterwards, to wit, on said day, with said names and said imaginary, false, pretended and fictitious answers, items of information, particulars, facts and statistics put, placed, inserted and written therein, in manner and form aforesaid, to wilfully and knowingly duly certify and have, and procure to be certified in form of law, by him, the said Louis E. Strum, as enumerator as aforesaid, within and for said subdivision, and the same schedule filled and certified as aforesaid, afterwards, to wit, at said city of Minneapolis on said day, to unlawfully, wilfully and knowingly forward, with other like schedules to the said supervisor as his, the said Louis E. Strum's returns, under the provisions of said act, they, the said Edward A. Stevens. Thaddens S. Dickey, and Louis E. Strum, then and there, to wit, when they conspired, combined, and confederated together as aforesaid, well knowing that the said names, answers, items of information, particulars, facts and statistics, and each and every one of them, were imaginary, pretended, false and fictitious, and that none of said imaginary, pretended, and fictitious persons were, on the first day of June, in the year of our Lord one thousand

eight hundred and ninety, or ever, residents or inhabitants of his, the said Louis E. Strum's said subdivision, and he, the said Louis E. Strum, not having obtained said names, answers, items of information, particulars, facts, and statistics, or any or either of them, by any inquiry made by him, the said Louis E. Strum, of any one, nor by visit by him, the said Louis E. Strum, personally to any dwelling-house or family in his said subdivision, nor in the course of enumeration or convass by him, the said Louis E. Strum, of his said subdivision, as they, the said Edward A. Stevens, Thaddens S. Dickey, and Louis E. Strum, then and there well knew.

That afterwards, to wit, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in said district, pursuant to said conspiracy, and to promote and effect the object thereof, the said Louis E. Strum, he, the said Louis E. Strum, still being and acting then and there as enumerator as aforesaid, within and for his said subdivision and still having in his custody and possession as such enumerator, the said schedules, and the said Davenport, still being and acting then and there as supervisor of census within and for said second census district, in and upon one of said blank schedules, to wit, the blank schedule last hereinbefore mentioned, did then and there unlawfully, wilfully and knowingly put, place, insert, and write the several imaginary, false, and fictitious names aforesaid in the several blanks left and provided for the names of persons respectively to be enumerated thereon pursuant to the provisions of said act, and divers imaginary, false, pretended and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedule for answers, to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule.

And so the grand jurors aforesaid, do say that the said Edward A. Stevens, Thaddens S. Dickey, and Louis E. Strum, then and there, to wit, at the said city of Minneapolis, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, unlawfully and maliciously did conspire, combine and confederate together, and with each other, to unlawfully, wilfully, and knowingly make the fictitious returns aforesaid, in manner and form aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in this district, the said Davenport still being and acting as the supervisor of census within and for said second census district, and the said Louis E. Strum still being and acting as an enumerator within and for his said subdivision, and still having in his custody and possession as such enumerator, the said blank original schedules, Edward A. Stevens, Thaddens S. Dickey, and the said Louis E. Strum, yeomen, late of said city, together with other

evil disposed persons, whose names are as yet to the jurors aforesaid unknown, did unlawfully and maliciously conspire, combine and confederate together, and with each other, in and upon one of said schedules then and there unlawfully, wilfully, and knowingly to put, place, insert, and write the following imaginary, false, and fictitious names of persons, that is to say: Gordon Douglas, Grace Douglass, David Douglass, Belke Douglas, Robert Douglass, Mary J. Douglass, Ann F. Douglass, William Douglas, Andrew Douglas, in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon, pursuant to the provisions of said act, and imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule; and in and upon one other of said schedules then and there unlawfully and knowingly to put, place, insert and write the following names of persons not inhabitants of or within his, the said Louis E. Strum's, said subdivision on the first day of June, in the year of our Lord one thousand eight hundred and ninety, that is to say: Ambrose W. Daynes, Mattie F. Daynes, John P. Daynes, William Daynes, Obedia Daynes, Lizzie Daynes, in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon, pursuant to the provisions of said act, and imaginary false, pretended, and fictitious answers, items of information, particulars, facts and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon and required by said act to be answered in and upon said schedule, and the said schedules afterwards, to wit, on such day, with said names and said imaginary, false, pretended, and fictitious answers, items of information, particulars, facts and statistics put, placed, inserted, and written in manner and form aforesaid, to then and there wilfully and knowingly duly certify, and have and procure to be certified in form of law by him, the said Louis E. Strum, as enumerator as aforesaid, written and for said subdivision, and the same schedules, filled and certified as aforesaid afterwards, to wit, at said city of Minneapolis, on said day to unlawfully, knowingly, and wilfully forward with other like schedules, to the said supervisor as his, the said Louis E. Strum's, returns under the provision of said act; they, the said Edward E. Stevens, Thaddens S. Dickey, and Louis E. Strum, then and there, to wit, when they conspired, combined, and confederated together as aforesaid, well knowing that said names, answers, items of information, particulars, facts, and statistics, and each and every of them, were then and there imaginary, pretended, false, and fictitious, and that none of said imaginary, pretended, fictitious, and non-resident persons were, on the first day of June, in the year of our Lord one thousand eight hundred and ninety, or ever, residents or inhabitants of his, the said Louis

E. Strum's, said subdivision, and he, the said Louis E. Strum, not having obtained said names, answers, items of information, particulars, facts and statistics, or any or either of them, by any inquiry made by him or any one, nor by visit by him, the said Louis E. Strum, personally to any dwelling-house or family in his subdivision, nor in the census of enumeration or canvass by him, the said Louis E. Strum, of his subdivision, as they, the said Edward A. Stevens, Thaddens S. Dickey and Louis E. Strum, then and there well knew.

That afterwards, to wit, on said second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in said district, pursuant to said conspiracy, and to promote and effect the object thereof, the said Louis E. Strum, he, the said Louis E. Strum, still being and then and there acting as enumerator as aforesaid, within and for his said subdivision, and still having in his custody and possession as such enumerator, the said schedules, and the said Davenport still being and acting then and there as supervisor of census within and for said second census district, in and upon one of said blank schedules did then and there unlawfully, wilfully, and knowingly, insert, put, place, and write the following imaginary, false, and fictitious names, that is to say: Gordon Douglas, Grace Douglas, David Douglas, Belke Douglas, Robert Douglas, Mary J. Douglas. Ann F. Douglas, William Douglas, Andrew Douglas,-in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon, pursuant to the provisions of said act, and divers imaginary, false, pretended, and fictitious answers, items of information, particulars, facts and statistics in the several blanks left and provided in said blank schedules for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule, and in and upon another one of said blank schedules did then and there unlawfully, wilfully, and knowingly put, place, insert, and write the following imaginary, false, and non-resident names, that is to say: Ambrose W. Daynes, Mattie F. Daynes, John P. Daynes, William Daynes, Obedia Daynes, Lizzie Daynes, in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon pursuant to the provisions of said act, and divers imaginary, false, pretended, and fictitious answers, items of information, particulars, facts and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Edward A. Stevens, Thaddens S. Dickey, and Louis E. Strum, then and there, to wit, at the said city of Minneapolis, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, unlawfully and maliciously did conspire, combine, and confederate together, and

with each other, to unlawfully, wilfully, and knowingly make the fictitious returns aforesaid, in manner and form aforesaid contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.

And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on said second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in this district, the said Davenport still being and acting as the supervisor of census within and for said census district, and the said Louis E. Strum still being and acting as an enumerator within and for his said subdivision, and still having in his custody and possession as such enumerator the said blank original schedules, Edward A. Stevens, Thaddens S. Dickey, and the said Louis E. Strum, yeoman, late of said city, together with other evil disposed persons whose names are as yet to the jurors aforesaid unknown, did unlawfully and maliciously conspire, combine, and confederate together, and with each other, in and upon divers, to wit, fifty, of said blank schedules then and there unlawfully, wilfully, and knowingly, to put, place, insert, and write divers, to wit, three hundred imaginary, false, and fictitious names in the several blanks left and provided thereon respectively for the names of persons to be enumerated thereon, pursuant to the provisions of said act, and divers imaginary, false, pretended, and fictitious answers, items of information, particulars, facts and statistics in the several blanks left and provided in said blank schedules respectively for answers to the several inquiries set forth and contained therein respectively concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedules respectively, and in and upon divers, to wit, fifty, other of said blank schedules, then and there unlawfully, wilfully and knowingly to put, place, insert, and write divers, to wit, three hundred names of persons not inhabitants or within his, the said Louis E. Strum's, said subdivision, on the first day of June, in the year of our Lord one thousand eight hundred and minety, in the several blanks left and provided thereon respectively for the names of persons to be enumerated thereon, pursuant to the provisions of said act, and divers imaginary, false, pretended and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedules respectively for answers to the several inquiries set forth and contained therein respectively concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedules, and the said schedules, and each and every of them, with said imaginary, false, pretended, fictitious, and non-resident names, and said imaginary, false, pretended, and fictitious answers, items of information, particulars, facts and statistics put, placed, inserted, and written therein, in manner and form aforesaid, to unlawfully, wilfully and knowingly, duly certify and have and procure to be duly certified, in form of law by him, the said Louis E. Strum, as enumerator as aforesaid, within and for his said subdivision, and the same schedules filled and certified as aforesaid afterwards.

to wit, at the said city of Minneapolis on said day to unlawfully, knowingly and wilfully forward, with other like schedules to the said supervisor as his, the said Louis E. Strum's, returns under the provision of said act, they, the said Edward A. Stevens, Thaddens S. Dickey, and Louis E. Strum, then and there, to wit, when they conspired, combined, and confederated together as aforesaid, well knowing that the said names, answers, items of information, particulars, facts and statistics, and each and every of them, were then and there imaginary, pretended, false and fictitious and that none of said imaginary, pretended, fictitious and non-resident persons were on the first day of June, in the year of our Lord one thousand eight hundred and ninety, or ever, residents or inhabitants of his, the said Louis E. Strum's, said subdivision and that the said names were not then and there, or ever, the names of persons having their place or places of abode or being inhabitants, nor was either of them the name of any person having his or her place of abode, or being an inhabitant of or within his, the said Louis E. Strum's, said subdivision, on said first day of June in the year of our Lord one thousand eight hundred and ninety, and he, the said Louis E. Strum, not having obtained said names, answers, items of information, particulars, facts, and statistics, or any or either of them, by any inquiry made by him of any one, nor by visit by him, the said Louis E. Strum, personally to any dwelling-house or family in his said subdivision, nor in the course of enumeration or canvass by him, the said Louis E. Strum, of his said subdivision, as they, the said Edward A. Stevens, Thaddens S. Dickey, and Louis E. Strum, then and there well knew.

That afterwards, to wit, on second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in said district, pursuant to said conspiracy, and to promote and effect the object thereof, the said Louis E. Strum, he, the said Louis E. Strum, still being and acting then and there as enumerator as aforesaid within and for his said subdivision, and still having in his custody and possession as such enumerator the said schedules, and the said Davenport still being and acting then and there as supervisor of census within and for said second census district. in and upon divers, to wit, fifty, of said blank schedules, did then and there unlawfully, wilfully and knowingly put, place, insert, and write the following fictitious names, to wit, Grace Douglas, and Mattie F. Daynes and other names, to wit, three hundred imaginary, false and fictitious names in the several blanks left and provided thereon respectively for the names of persons to be enumerated thereon, pursuant to the provisions of said act. and divers imaginary, false, pretended and fictitious answers, items of information. particulars, facts, and statistics, in the several blanks left and provided in said blank schedules respectively for answers to the several inquiries set forth and contained therein respectively concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedules respectively; and in and upon divers, to wit, fifty other of said blank schedules, did then and there unlawfully, wilfully and knowingly put, place, insert and

write divers, to wit, three hundred imaginary, false, pretended, and non-resident names, in the several blanks left and provided thereon respectively for the names of persons to be enumerated thereon, pursuant to the provisions of said act, and divers imaginary, false, pretended, and fictitious answers, items of information, particulars, facts and statistics in the several blanks left and provided in said blank schedules respectively for answers to the several inquiries set forth and contained therein respectively concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedules respectively.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Edward A. Stevens, Thaddens S. Dickey, and Louis E. Strum, then and there, to wit, at the said city of Minneapolis, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, unlawfully and maliciously did conspire, combine, and confederate together and with each other to unlawfully, wilfully, and knowingly, make the fictitious returns aforesaid, in manner and form aforesaid, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.

GEO. N. BAXTER, Special Assistant U. S. Attorney.<sup>28</sup>

[28. United States v. Stevens, 44 Fed. 132. Form used in this case in indicting for conspiracy to make false certificates and also to make false returns in violation of the census laws. It was held that in stating the object of the conspiracy, the same certainty and strictness are not required as in the indictment for the offense conspired to be committed and declaring that "certainty to a common intent sufficient to identify the offense which the defendants conspired to commit is all that is required."]

# FORM 27.

#### Conspiracy.

The grand inquest of the State of Delaware and the body of New Castle county on their oath and affirmation, respectively, do present:

That Samuel A. McDaniel, of the Hundred of New Castle; Harvey B. Wigglesworth, of the Hundred of Wilmington, and Walter Rash, of the Hundred of Wilmington, all in the county of New Castle and the State of Delaware, on the 31st of March in the year of our Lord one thousand nine hundred and one, at New Castle Hundred, in the county of New Castle, aforesaid, he, the said Samuel A. McDaniel then and there being the sheriff of said county of New Castle, and he, the said Harvey B. Wigglesworth, then and there being a warden in the county jail for said county and a deputy under him, the said Samuel A. McDaniel sheriff as aforesaid, and the said Walter Rash, then and there

being a warden in the said county jail and a deputy under him, the said Samuel A. McDaniel, sheriff as aforesaid, and he, the said Evan G. Boyd. then and there being mayor of the city of New Castle, in said county, and being persons of evil minds and dispositions, with force and arms unlawfully and wickedly did conspire, combine, confederate and agree together, by certain false pretenses, unlawfully to obtain for the use and benefit of the said Samuel A. McDaniel, from a certain Horace G. Rettew, the said Horace G. Rettew then and there being receiver of taxes and county treasurer of the county of New Castle aforesaid, a large sum of money, to wit, the sum of two thousand five hundred dollars, lawful money of the United States of America, the kind and denomination of which money is to the jurors aforesaid unknown, of the money, goods and chattels then and there the property of and in the ownership, possession and control of him, the said Horace G. Rettew, receiver of taxes and county treasurer for said New Castle county as aforesaid, the which said false pretenses in pursuance of and according to the said conspiracy, combination, confederacy and agreement of the said Samuel A. McDaniel, Harvey B. Wigglesworth, Walter Rash and Evan G. Boyd, so had as aforesaid, were thereafter, on and about the 30th of June, 1901, at the county aforesaid, embodied in a certain false, deceitful, fraudulent and padded bill of the said Samuel A. McDaniel, as sheriff as aforesaid, for the three months ending on the said 30th day of June, A. D. 1901, which said false, deceitful, fraudulent and padded bill was in due course then and there presented by the said Samuel A. McDaniel, as sheriff as aforesaid, to George D. Kelley, county comptroller for the county of New Castle aforesaid, and to the Levy Court commissioners of New Castle county aforesaid, for the purpose of then and there obtaining the approval thereon by the said comptroller for said county and by the said Levy Court commissioners for said county, and the consequent payment thereof then and there out of the funds and moneys which were then and there of the property of and in the possession, ownership and control of him, the said Horace G. Rettew, receiver of taxes and county treasurer for said county, and by which said false, deceitful, fraudulent and padded bill was then and there falsely, untruly, fraudulently and knowingly stated and set forth the pretended and therein alleged number of vagrants lodging and prisoners being and remaining in the jail of New Castle county from day to day in and during the three months ending on the said 30th day of June, A. D. 1901, with intent then and there by means of the said false pretenses to cheat and defraud the said Horace G. Rettew, receiver of taxes and county treasurer of said county as aforesaid, of the said sum of money, to the evil example of all others in like case offending and against the form of an act of the General Assembly in case made and provided, and against the peace and dignity of the State.29

[29. State v. McDaniel, 4 Penn. (Del.) 97, 54 A. 1056. In this case the above indictment was, on a motion to quash, held sufficient.]

#### FORM 28.

#### Conspiracy.

STATE OF MARYLAND, CITY OF BALTIMORE, TO WIT:

The jurors for the State of Maryland for the body of the city of Baltimore, on their oath present, that by an act of Congress of the United States, passed on the tenth day of April, in the year of our Lord one thousand eight hundred and sixteen, at the city of Washington, entitled "An act to incorporate the subscribers to the Bank of the United States," a bank was established and chartered as a corporation and body politic, by the name and style of The President, Directors and Company, of the Bank of the United States, with authority, power and capacity, among other things, to have, purchase, receive, possess, enjoy and retain, to them and their successors, lands, rents, tenements, hereditaments, goods, chattels and effects, of whatsoever kind, nature and quality, to an amount not exceeding in the whole fifty-five millions of dollars. to deal and trade in bills of exchange, gold and silver bullion, and to take at the rate of six per centum per annum for or upon its loans or discounts, and to issue bills or notes signed by the president, and countersigned by the principal cashier or treasurer thereof, promising the payment of money to any person or persons, his, her, or their order, or to bearer. And that under and by virtue of the power and authority given to the said directors by the said act of Congress, an office of discount and deposit of the said corporation was, at the time hereinafter mentioned, regularly and duly established in pursuance of the power contained in the said act, at the city of Baltimore, in the State of Maryland aforesaid, and that George Williams, late of the city of Baltimore, merchant, was at the time hereinafter mentioned, and before and afterwards one of the directors of the said bank of the United States at Philadelphia, to wit, at the city of Baltimore aforesaid, and that James A. Buchanan, late of the city of Baltimore, merchant, was at the time hereinafter mentioned, and before and since, president of the said office of discount and deposit of the said Bank of the United States, in the city of Baltimore, and James W. M'Culloh, late of the city of Baltimore, gentleman, was at the time hereinafter mentioned, and before and afterwards cashier of the said office of discount and deposit of the said Bank of the United States in the city of Baltimore, to wit, at the city of Baltimore aforesaid. And that the said George Williams, so being one of the directors of the said Bank of the United States, and the said James A. Buchanan, so being president of the said office of discount and deposit of the said bank in the city of Baltimore, and the said James W. M'Culloh, so being cashier of the said office of discount and deposit of the said bank in the city of Baltimore, being evil disposed and dishonest persons, and wickedly devising, contriving and intending, falsely, unlawfully, fraudulently, craftily and unjustly, and by indirect means, to cheat and impoverish the said president, directors and company, of the Bank of the United States, and to defraud them of their monies funds and promissory notes for the payment of money, commonly

called bank notes, and of their honest and fair gains to be derived under and pursuant to the said act of Congress from the use of their said monies, funds and promissory notes for the payment of money, commonly called bank notes, on the eighth day of May, in the year of our Lord one thousand eight hundred and nineteen, at the city of Baltimore aforesaid, with force and arms, etc., did wickedly, falsely, fraudulently and unlawfully conspire, combine, confederate and agree together, by wrongful and indirect means, to cheat, defraud and impoverish the said president, directors and company of the Bank of the United States, and by subtle fraudulent and indirect means, and divers artful, unlawful and dishonest devices and practices, to obtain and embezzle a large amount of money, and promissory notes for the payment of money, commonly called bank notes, to wit, of the amount and value of fifteen hundred thousand dollars current money of the United States, the same being then and there the property, and part of the proper funds of the said president, directors and company, of the Bank of the United States, from and out of the said office of discount and deposit of the said bank in the city of Baltimore, without the knowledge, privity or consent of the said president, directors and company, of the Bank of the United States, and also without the privity, consent or knowledge of the directors of the said office of discount and deposit of the said bank in the city of Baltimore for the purpose of having and enjoying the use thereof for a long space of time, to wit, for the space of two months, without paying any interest, discount or equivalent, for the use thereof, and without securing the repayment thereof to the said corporation. And the more effectually and securely to perpetrate and conceal the same, that the said James W. M'Culloh should, from time to time, falsely and fraudulently state, allege and represent, to the said directors of the said office of discount and deposit in the city of Baltimore, that such monies and promissory notes, so agreed to be obtained and embezzled as aforesaid, were loaned on good, sufficient and ample security, in capital stock of the said bank, pledged and deposited therefor; and also should, from time to time, make and fabricate false statements and vouchers respecting the same, and other property and funds of the said corporation, to be laid before and exhibited to the said directors of the said office of discount and deposit of the said bank in the city of Baltimore. And that the said George Williams, James A. Buchanan, and James W. M'Culloh, being such officers of the said corporation as aforesaid, did then and there, in pursuance of and according to the said unlawful, false and wicked conspiracy and confederacy, combination and agreement aforesaid, by indirect, subtle, wrongful, fraudulent and unlawful means, and by divers artful and dishonest devices and practices, and without the knowledge, privity or consent of the said president, directors and company, of the Bank of the United States, and without the privity, knowledge or consent of the directors of the said office of discount and deposit of the said bank in the city of Baltimore, obtain and embezzle a large amount of monies, and of promissory notes for the payment of money, commonly called bank notes, the same being the property and part of the proper funds of the said corporation,

from and out of their said office of discount and deposit in the city of Baltimore, to wit, of the amount and value of fifteen hundred thousand dollars current money of the United States, for the purpose of having and enjoying the use thereof, and did have and enjoy the use thereby, for a long space of time, to wit, for the space of two months, without paying interest, discount or equivalent therefor, and without securing the repayment of the said monies, and the said promissory notes for the payment of money commonly called bank notes; and did then and there falsely, craftily, deceitfully, fraudulently, wrongfully and unlawfully keep and convert the same to their own use and benefit, without the knowledge, privity or consent of the said corporation, and without the knowledge, privity or consent of the directors of the said office of discount and deposit in the city of Baltimore, and did then and there, the more effectually to perpetrate and conceal the said conspiracy, confederacy, fraud and embezzlement, cause and procure false and fraudulent representations, allegations, statements and vouchers, to be made and fabricated, and the same to be exhibited to and laid before the directors of the said office of discount and deposit in the city of Baltimore, by the said James W. M'Culloh, as cashier of the said office of discount and deposit, respecting the said monies, and the said promissory notes for the payment of money so obtained and embezzled as aforesaid, in which said representations, allegations, statements and vouchers, it was then and there falsely and fraudulently represented, alleged and exhibited, that the said monies, and promissory notes for the payment of money, were loaned on good, sufficient and ample security, in capital stock of the said bank, pledged and deposited therefor, when in truth and in fact no capital stock of the said bank and no other security was pledged or deposited therefor, as the said George Williams, James A. Buchanan and James W. M'Culloh then and there well knew. And that the said false, wicked, unlawful and fraudulent conspiracy, confederacy and agreement above mentioned, and the said false, wicked, unlawful and fraudulent acts done in pursuance thereof, above set forth, were then and there made, done and perpetrated, by the said George Williams, James A. Buchanan and James W. M'Culloh, in abuse and violation of their duty, and the trust reposed in them and the oaths taken and lawfully sworn by them respectively as such officers of the said corporation as aforesaid. And that the said George Williams, James A. Buchanan and James W. M'Culloh did then and there thereby falsely, wickedly, fraudulently, wrongfully and unlawfully impoverish, cheat and defraud the said president, directors and company of the bank of the United States, to the great damage of the said president, directors and company, to the evil example of all others in like manner offending and against the peace, government and dignity of the State of Maryland, etc.

And the jurors aforesaid, on their oath aforesaid, do further present, that the said George Williams, so being one of the directors of the said Bank of the United States at Philadelphia, to wit, at Baltimore aforesaid, and the said James A. Buchanan, so being president of the said office of discount and deposit of the said bank in the city of Baltimore, and the said James W. M'Culloh, so

being cashier of the said office of discount and deposit of the said bank in the city of Baltimore, being evil disposed and dishonest persons, and wickedly devising and contriving, and intending, falsely, unlawfully, fraudulently, craftily and unjustly, and by direct means, to cheat and impoverish the said president, directors and company of the Bank of the United States, to defraud them of their monies, funds and promissory notes for the payment of money, commonly called bank notes, and of their honest and fair gains to be derived under and pursuant to the said act of Congress, from the use of their said monies, funds and promissory notes for the payment of money, commonly called bank notes, afterwards, to wit, on the eighth day of May, in the year of our Lord one thousand eight hundred and nineteen, at the city of Baltimore, aforesaid, with force and arms, etc., did wickedly, falsely, fraudulently and unlawfully conspire, combine, confederate and agree together, by wrongful and indirect means, to cheat, defraud and impoverish the said president, directors and company of the Bank of the United States, and by subtle fraudulent and indirect means and divers artful, unlawful and dishonest devices and practices, to obtain and embezzle a large amount of money, and of promissory notes for the payment of money, commonly called bank notes, to wit, of the amount and value of fifteen hundred thousand dollars current money of the United States, the same being then and there the property and part of the proper funds of the said president, directors and company of the Bank of the United States of and out of the said office of discount and deposit of the said bank in the city of Baltimore, without the knowledge, privity or consent of the said president, directors and company of the Bank of the United States, and also without the privity, consent or knowledge of the directors of the said office of discount and deposit of the said bank in the city of Baltimore, for the purpose of having and enjoying the use thereof for a long space of time. to wit, for the space of two months, without paying any interest, discount or equivalent for the use thereof, and without securing the repayment thereof to the said corporation.

And that the said false, wicked, unlawful and fraudulent conspiracy, confederacy and agreement, above mentioned, were then and there made, done and perpetrated by the said George Williams, James A. Buchanan and James W. M'Culloh, in abuse and violation of their duty, and the trust reported in them, and the oaths taken and lawfully sworn by them respectively as such officers of said corporation as aforesaid, to the great damage of the said president, directors and company, to the evil example of all others in like manner offending, and against the peace, government and dignity of the State of Maryland, etc.

# LUTHER MARTIN,

Attorney-General of Maryland and District Attorney of Baltimore City Court.30

[30. The State v. Buchanan, 5 Har. & J. (Md.) 317, 318. Form used in this case in indicting for conspiracy to defraud a bank.]

# FORM 29.

#### Conspiracy.

Bergen Oyer and Terminer and General Jail Delivery, December Term, A. D. 1854—Bergen County, To Wit:

The grand inquest of the State of New Jersey in and for the body of the county of Bergen, upon their oaths present, that Susan Ann Smith, Albert Smith, Maria Smith, Joel M. Johnson and Richard Van Winkle, late of the township of Franklin, in the said county of Bergen, wickedly devising and intending one William W. Packer, not only of his credit and good name unjustly to deprive, but also to obtain and acquire to themselves of and from the said W. W. P. divers sums of money, and large amounts of property and other valuable things, on the fifth day of October, in the year one thousand eight hundred and fifty-four, with force and arms, at the township aforesaid, in the county aforesaid, and within the jurisdiction of this court, did amongst themselves unlawfully conspire, combine, confederate and agree to extort, obtain and procure of and from the said W. W. P. large sums of money, and a large amount of property, and security for a large sum of money, for their own use; and in order to extort, obtain and procure the same, did corruptly and unlawfully conspire and agree together falsely to charge, and cause to have falsely charged the said W. W. P., before one of the justices of the peace of the said county, on and by the oath of the said Susan Ann Smith, with having got the said S. A. S., she then being a single woman, with child of a bastard, and to procure the issuing of a warrant thereupon by such justice of the peace for the arrest of the said W. W. P., and when the said W. W. P. should be so arrested and under duress of imprisonment, to extort, obtain and procure from the said W. W. P. said money, property and security for money for their use, by offering to receive the same for the suppression and compromise of the said charge, and for the liberation of said W. W. P. from arrest and imprisonment under such warrant. And the jurors aforesaid, upon their oath aforesaid, say that the said S. A. S., A. S., J. M. J., M. S. and R. V. W., the defendants, in furtherance of their conspiracy, afterwards, to wit, on the day and year aforesaid, at the township and in the county aforesaid, did, before one James V. Jeralemon, then being one of the justices of the peace in and for the said county, falsely charge, and cause and procure the said S. A. S., upon and by her oath, falsely to charge that the said W. W. P. was the father of the bastard of which she then alleged herself to be with child, and which she then alleged was to be born a bastard, and chargeable upon the township of Franklin, in the said county, and that upon the said charge the said defendants procured a warrant to be issued by the said J. V. J., justice of the peace as aforesaid, by virtue of which said warrant the said defendants afterwards arrested, and caused and procured to be arrested, the body of the said W. W. P., and him held in custody, and while so under arrest

and in custody then and there did unlawfully, wilfully and deceitfully endeavorto obtain, extort and procure of and from the said W. W. P. a large sum of money, security for a large sum of money, and property and things of great value, as and for a consideration or recompense to them for compromising and suppressing said charge, giving up the further prosecution thereof, and releasing the said W. W. P., and then and there the said defendants did unlawfully, wilfully and fraudulently obtain, extort and procure from the said W. W. P. and cause him to make, execute and deliver a bond or obligation, under the hand and seal of the said W. W. P. bearing date the fifth day of October, in the year last aforesaid, to the said A. S. in the penal sum of two thousand dollars, upon condition that the said W. W. P. should pay to the said A. S. on the first day of May next ensuing the date thereof, the sum of one thousand dollars, also, a certain mortgage, dated the day and year last aforesaid, executed and given by the said W. W. P. on lands of him, the said W. W. P., situate in the township of Franklin aforesaid, to the said A. S. to secure the payment of the said bond, which bond and mortgage were given as the consideration or price for suppressing and compromising said charge, and releasing said W. W. P. from arrest; that the said bond and mortgage were taken and received by the said defendants from the said W. W. P. for their use to the great perversion and obstruction of justice and the due administration of the laws, to the evil example of all others in like cases offending, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said defendants, on the fifth of October, in the year eighteen hundred and fifty-four, with force and arms aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, wickedly intending to extort, obtain and procure of and from the said W. W. P. a large sum of money, property of great value, and securities for the payment of a large sum of money for their use, and in order to extort, obtain and procure the same, did corruptly, unlawfully and falsely conspire and agree to charge, and caused to be charged the said W. W. P. on and by the oath of the said S. A. S., to be taken and sworn, by the said S. A. S., before one of the justices of the peace of said county, with having got the said S. A. S. with child of a bastard, which would, when born, be chargeable on the said township of Franklin as a pauper, and to cause and procure the arrest of the said W. W. P. and thereby to put the said W. W. P. in constraint and in fear of public infamy and disgrace, and of liability to secure and indemnify the said township of Franklin from the support of such bastard child when born, and to extort, obtain and procure from the said W. W. P. the said sum of money, property and security for money, for their use by offering to receive the same as a consideration or price for the suppression of the said charge, and liberating him from arrest, and indemnifying the said W. W. P. from the pretended liability for the support of such bastard when born.

That the said defendants, in furtherance of their said conspiracy after-

wards, to wit, on the day and year last aforesaid, at the township, in the county, and within the jurisdiction aforesaid, did falsely, corruptly and wilfully present, and caused and procured to be presented, to one J. V. J., then being one of the justices of the peace in and for said county a certain writing purporting to be the voluntary examination of the said S. A. S. taken on the oath of the said S. A. S. before the said justice of the peace, by which writing it was charged and declared that the said S. A. S. was then with child, and that the said child was likely to be born a bastard, and to be chargeable to the said township of Franklin, and that the said W. W. P. was the father of the said child, and the said defendants falsely and corruptly caused and procured the said S. A. S. to make oath before the said justice of the peace that the statements and charge in the said writing were true, that the said defendants then and there procured a warrant to be issued by the said justice of the peace for the arrest of the said W. W. P. and put into the hands of said defendants, under and by virtue of which said warrant the said defendants afterwards, to wit, on the day and year last aforesaid, arrested, and caused and procured to be arrested the body of the said W. W. P. and him there held in custody, and while so under arrest and in custody, then and there did unlawfully, wilfully and deceitfully endeavor to obtain, extort and procure from the said W. W. P. a large sum of money, property of great value, and securities for the payment of a large sum of money, as and for a consideration or recompense to them for the compromising and suppression of the said charge, saving him, the said W. W. P., from any public disrepute, liberating him from custody under said warrant and indemnifying him from any liability for the support of said bastard child when born, and the said defendants then and there did unlawfully, wilfully and fraudulently did obtain, extort and procure from the said W. W. P. and cause him, the said W. W. P., to make, execute and deliver to the said A. S. a certain bond or writing obligatory under the hand and seal of the said W. W. P., dated the fifth day of October, in the year last aforesaid, by which the said W. W. P. bound himself to the said A. S. in the penal sum of two thousand dollars, the said bond by virtue of a condition thereunto written, to be void if said W. W. P. should pay to the said A. S. on the first day of May next ensuing the date thereof, the sum of one thousand dollars and also a certain mortgage of the same date, given by the said W. W. P. upon land and real estate of the said W. W. P., situate in the said township of Franklin, to secure to the said A. S. payment of the sum of money mentioned in the conditions of the said bond, which said bond and mortgage were given to the said A. S. by the said W. W. P. as a composition of and an agreement to suppress the said charge, saving the said W. W. P. from public scandal and disrepute, liberating him from custody under said warrant, and indemnifying him from the said pretended liability, and that the said bond and mortgage were taken and received by the said defendants for the use and benefit of said defendants, to the perversion and obstruction of justice and the due administration of the laws, to the evil example of all others in like cases offending, contrary

to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.<sup>31</sup>

[31. Johnson v. Smith, 26 N. J. L. 313, 314. Form used in this case for indicting for conspiracy to falsely charge the commission of an offense and to procure the accused's arrest and to extort money by offering to compromise and settle the charge. It was held that if the indictment charge that the defendants falsely conspired it is not necessary to aver the innocence of the party against whom the conspiracy is found, or that he was falsely charged.]

# FORM 30. Conspiracy.

COUNTY COURT-ERIE COUNTY.

The People of the State of New York against Anton J. Wiechers and Franklin S. Temple.

The grand jury of the county of Erie by this indictment accuse Anton J. Wiechers and Franklin S. Temple of the crime of conspiracy, committed as follows, to wit: That heretofore and prior to the finding of this indictment, and on the 20th day of October, in the year of our Lord one thousand nine hundred and two, at the city of Buffalo, in the county of Erie aforesaid, the said Anton J. Wiechers and Franklin S. Temple, and each of them, with force and arms and with intent to cheat and defraud and obtain money and other property from the person and persons hereinafter named or mentioned and from divers citizens of the county of Erie, and the public generally, whose names are to the grand jury aforesaid unknown, and the further particulars whereof cannot therefore now be given, and with and by color and aid of certain false and fraudulent representations and pretenses hereinafter named and recited, did wilfully, maliciously and feloniously and wrongfully conspire, combine and confederate and agree together to obtain from the possession of said person and persons hereinafter named or mentioned, and from the said divers citizens of the county of Erie, and the said public generally, the money and other property in kind and amounts hereinafter specified, and in further kinds and amounts to the grand jury aforesaid unknown, the particulars whereof cannot therefore now be given, of the goods, chattels, and personal property of the said person, persons, citizens and public generally, the true owner and owners thereof, of their said property and to appropriate the same to the use of the said Anton J. Wiechers and Franklin S. Temple, and to each of them, and that thereupon and heretofore and upon the aforesaid day and the said Anton J. Wiechers and Franklin S. Temple, and each of them, in furtherance of said unlawful, malicious and fraudulent conspiracy and agreement and with intent to cheat and defraud and obtain money and other property, as aforesaid, did then and there feloniously, falsely and fraudulently pretend and represent in, through and by means of the public press

and certain newspapers published in the city of Buffalo, aforesaid, and in and through and by means of certain advertisements and printed matter, caused to be printed and published in said newspapers by the said Anton J. Wiechers and Franklin S. Temple, and in divers other ways, that a certain individual known by and under the name of "Antonius" and as "Antonius. the boy phenomenon," possessed a marvelous power in healing the sick and afflicted and stood peerless and alone the greatest magnetist of modern times, with a present ability and power to cure the deaf, blind, lame and all forms of paralysis, epilepsy, dropsy, diabetes and Bright's disease, and all other bodily afflictions, and that he possessed the power to heal the sick and afflicted by means of certain magnetism contained in his body, and that the said Anton J. Wiechers and Franklin S. Temple, and each of them, in furtherance of the said unlawful, malicious and fraudulent conspiracy and agreement, and with intent to cheat and defraud and obtain money and other property, as aforesaid, did then and there wilfully, maliciously and feloniously conspire, combine, confederate and agree together that the said Anton J. Wiechers and Franklin S. Temple, and each of them, should falsely and fraudulently pretend and represent to the said person and persons, and the said divers citizens of the county of Erie, and the said public generally, that the said Anton J. Wiechers and Franklin S. Temple, and each of them, was the same certain individual known by and under the name of "Antonius" and as "Antonius, the boy phenomenon," mentioned and described and possessing the powers as set forth in, through and by means of the public press and certain newspapers published in the city of Buffalo aforesaid, and in, through and by means of certain advertisements and printed matter, cause to be printed and published in said newspapers by said Anton J. Wiechers and Franklin S. Temple, and in divers other ways, as hereinbefore set forth, that they, the said Anton J. Wiechers and Franklin S. Temple, and each of them, falsely pretending and representing himself to be the individual "Antonius" and "Antonius, the boy phenomenon" as aforesaid, should practice medicine and assume and attempt to exercise the powers of healing and curing ascribed to the said "Antonius" and "Antonius, the boy phenomenon," as aforesaid, in and upon the person, persons, divers citizens of the county of Erie, and the public generally, hereinbefore mentioned.

That thereupon and heretofore and upon the aforesaid day, the said Anton J. Wiechers and Franklin S. Temple, and each of them, in furtherance of the said unlawful, malicious and fraudulent conspiracy and agreement, and with intent to cheat and defraud and obtain money and other property, as aforesaid, did then and there falsely and fraudulently pretend and represent to the said person and persons, and the said divers citizens of the county of Erie, and the said public generally, that the said Anton J. Wiechers and Franklin S. Temple, and each of them, was the same certain individual known by and under the mame of "Antonius" and as "Antonius, the boy phenomenon," mentioned and described and possessing the powers as set forth in, through and by means of the public press and certain newspapers published in the city of Buffalo afore-

said, and in, through and by means of certain advertisements and printed matter caused to be printed and published in said newspapers by said Anton J. Wiechers and Franklin S. Temple, and in divers other ways, as hereinbefore set forth, and that they, the said Anton J. Wiechers and Franklin S. Temple. and each of them, falsely pretending and representing himself to be the individual "Antonius" and Antonius, the boy phenomenon," as aforesaid, did then and there practice medicine and assume and attempt to exercise the powers of healing and curing ascribed to the said "Antonius" and "Antonius, the boy phenomenon," as aforesaid, in and upon the person, persons, divers citizens of the county of Erie, and the public generally, hereinbefore mentioned; and that in particular the said Franklin S. Temple, conspiring and falsely and fraudulently pretending and representing as aforesaid, did examine, treat, practice medicine upon and prescribe for one Ethel Mackey, who then and there was suffering from some disease to the grand jury aforesaid unknown, affecting one of her knees, and the said Franklin S. Temple did then and there falsely and fraudulently represent to the father and mother of the said Ethel Mackey that he, the said Franklin S. Temple, was the individual "Antonius" and "Antonius, the boy phenomenon," as hereinbefore mentioned and described, and that he had cured many cases of the same kind and could cure the said Ethel Mackey of the said disease and would so cure her, upon the payment of the sum of two dollars for an examination and of twenty-eight dollars in addition thereto for home and personal treatments, and thereafter, upon the said day, the said Franklin S. Temple falsely, by pretending and representing as aforesaid, did wrongfully and maliciously undertake to cure and treat and practice medicine upon and prescribe for the said Ethel Mackey, and did give to the father and mother of the said Ethel Mackey medicines, with directions for the use of the same, and did, by means of such false, fraudulent and malicious pretenses and representations, obtain from Francis J. Mackey the sum of thirty dollars in lawful money of the United States, well knowing at the time that he obtained and received said money that he was not the individual "Antonious" and "Antonius, the boy phenomenon," and that the treatment and medicines prescribed and given by him for said Ethel Mackey would be ineffectual, and well knowing at the time that he could not effect a cure of the said disease.

Whereas, in truth and in fact the said individual known by and under the name of "Antonius" and as "Antonius, the boy phenomenon," did not possess a marvelous power in healing the sick and afflicted and did not stand peerless and alone the greatest magnetist of modern times and did not have a present ability and power to cure the deaf, blind, lame and all forms of paralysis, epilepsy, dropsy, diabetes and Bright's disease, and all other bodily afflictions, and did not possess power to heal the sick and afflicted by means of certain magnetism contained in his body, and, whereas, in truth and in fact, the said Anton J. Wiechers and Franklin S. Temple, and each of them, was not the individual known by and under the name of "Antonius" and as "Antonius, the boy phenomenon," mentioned and described as possessing the powers set forth

in, through, by means of the public press and certain newspapers published in the city of Buffalo aforesaid, and in, through and by means of certain advertisements and printed matter caused to be printed and published in said newspapers by said Anton J. Wiechers and Franklin S. Temple, and in divers other ways, as hereinbefore set forth, and, whereas, in truth and in fact, the said Anton J. Wiechers and Franklin S. Temple, and each of them, did not possess a marvelous power in healing the sick and afflicted and did not stand peerless and alone the greatest magnetist of modern times and did not have present ability and power to cure the deaf, blind, lame and all forms of paralysis, epilepsy, dropsy, diabetes, and Bright's disease, and all other bodily ailments and did not possess the power to heal the sick and afflicted, by means of certain magnetism contained in his body, all of which was well known to the said Anton J. Wiechers and Franklin S. Temple.

And theretofore, and because of the said conspiracy, combination, confederacy, and agreement of the said Anton J. Wiechers and Franklin S. Temple and the acts committed thereunder and in furtherance thereof, as hereinbefore set forth, the grand jury do, upon their oath, by this indictment accuse the said Anton J. Wiechers and Franklin S. Temple of the crime of conspiracy, contrary to the form of the statute in such case made and provided and against the peace of the people of the State of New York and their dignity.

#### EDWARD E. COATSWORTH,

District Attorney of Eric County.32

[32. In People v. Wiechers, 179 N. Y. 459, a judgment of conviction on the above indictment was affirmed. On the appeal the defendant sought to attack the indictment upon the ground that the representations set forth therein did not refer to any existing fact capable of proof, but only to the belief of the defendants that they, or the mythical boy "Antonius," whom they personated, possessed certain magnetism sufficient to cure all bodily afflictions. The court held that an accused person who has omitted to question an indictment, either by demurrer before the trial, or by objecting thereto during the trial or by a motion in arrest of judgment made after the trial, cannot attack it for the first time on appeal unless it is by an argument addressed to the discretion of the court hearing the appeal in the first instance, and that that discretion does not belong to the Court of Appeals except in capital cases.]

# FORM 31.

# Conspiracy.

BOROUGH, TOWN AND COUNTY OF THE TOWN OF SOUTHAMPTON:

The jurors for our Lady the Queen, upon their oath and affirmation present, that Mary Ann Mears, late of the parish of Saint Mary, in the town and county of the town aforesaid, single woman, being a person of wicked and deprayed mind and disposition, and contriving, and craftily, and deceitfully intending to debauch and corrupt the morals of one Johanna Carroll,

as hereafter mentioned, and to seduce her into an infamous and wicked course of life, heretofore and after the passing of a certain act of Parliament for the better preventing the heinous offense of procuring the defiling of women, to wit, on the 14th day of November, A. D. 1850, with force and arms, at the parish aforesaid, in the town and county aforesaid, did knowingly, deceitfully and unlawfully attempt and endeavor, as much as in her lay, to procure the said Johanna Carroll, the said Johanna Carroll then and there being a child under the age of twenty-one years, to wit, the age of fifteen years, an orphan and a servant out of place, to have illicit carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, by then and there knowingly and unlawfully falsely and fraudulently pretending and representing to the said Johanna Carroll, that she, the said Mary Ann Mears, was the friend of the said Johanna Carroll, and knew her father and mother, and that if she, the said Johanna Carroll, would go home with her, the said Mary Ann Mears, the said Mary Ann Mears would keep her until she, the said Johanna Carroll, could get a place, and that she, the said Mary Ann Mears, would herself try all she could to get her a place, and by then and there, under such false and fraudulent pretenses and representations, taking her, the said Johanna Carroll, to the house of the said Mary Ann Mears, and keeping her there for a long space of time, and soliciting her and trying to induce her then and there to have illicit carnal connection with the said man, whereas in truth and in fact the said Mary Ann Mears was not the friend of the said Johanna Carroll, and the said Mary Ann Means did not intend to take, and did not take, the said Johanna Carroll home with her to keep the said Johanna Carroll till she, the said Johanna Carroll, could get a place, or till she, the said Mary Ann Mears, could obtain a place for her, but craftily and subtilly with the wicked design and purpose, by the said false and fraudulent pretenses, representations and means aforesaid, to procure the said Johanna Carroll to have connection with a man as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath and affirmation aforesaid, do further present, that Amelia Chalk, late of the parish aforesaid, in the town and county aforesaid, laborer, at the time of the committing of the said misdemeanor, by the said Mary Ann Mears, as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, at the town and county aforesaid, the said Mary Ann Mears, to do and commit the said misdemeanor wickedly, knowingly and unlawfully did abet and assist, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. That the said Mary Ann Mears and Amelia Chalk afterwards, to wit, on the day and year last aforesaid, with force and arms, at the parish aforesaid, in the town and county aforesaid, wickedly, designedly and unlawfully did attempt and endeavor, by false pretenses, false representations, and other fraudulent means, to procure the said Johanna Carroll, then

being a child under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. That the said Mary Ann Mears and the said Amelia Chalk, afterwards, to wit, on the day and year aforesaid, with force and arms at the parish aforesaid, in the town and county aforesaid, did between themselves conspire, combine, confederate and agree together wickedly, knowingly and designedly to procure by false pretenses, false representations and other fraudulent means, the said Johanna Carroll, then being a poor child under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.<sup>33</sup>

[33. Reg. v. Mary Ann Mears and Amelia Chalk, 4 Cox Cr. Cas. 423. Form given for indicting for conspiracy to procure prostitution by false pretenses.]

# FORM 32.

#### Counterfeiting.

STATE OF ILLINOIS, COOK COUNTY, SS.:

The grand jurors chosen, selected and sworn, in and for the county of Cook, in the name and by the authority of the people of the State of Illinois, upon their oaths present, that John B. Miller, late of said county, on the first day of December, in the year of our Lord one thousand eight hundred and thirtyseven, in the county aforesaid, one press for coinage, made of iron, otherwise called a bogus press; one edging tool, made of iron and steel, adapted and intended for the working of coin round the edge with grainings, apparently resembling those on the edges of coin then and now current in the State aforesaid, to wit, Mexican dollars; one die, made of steel, in and upon which then and there were made and impressed the figure, resemblance and similitude of one of the sides, to wit, the eagle side of the coin then and now current within the State aforesaid, to wit, a Mexican dollar; one other die, made of steel, in and upon which then and there were made and impressed the figure, resemblance and similitude, to wit, the reverse of the eagle side of the coin then and now current within the State of Illinois, called a Mexican dollar: two crucibles made of clay and sand, made use of in counterfeiting the coin then and now current within the State aforesaid, to wit, Mexican dollars, without lawful excuse; then and there knowingly had in his possession, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the State of Illinois.

And the same grand jurors, chosen, selected and sworn, in and for the county aforesaid, in the name and by the authority aforesaid, upon their oaths aforesaid, do further present, that John B. Miller, late of said county, on the first day of December, in the year of our Lord one thousand eight hundred and thirty-seven, in the county aforesaid, one press for coinage, made of iron, one edging tool, made of iron and steel, adapted and intended for the working of coin round the edges, with grainings, apparently resembling those on the edges of coin then and now current within the State aforesaid, to wit, Mexican dollars; one die, made of steel in and upon which then and there were made and impressed the figure, resemblance and similitude of one of the sides, to wit, the eagle side of the coin then and now current within the State aforesaid, to wit, Mexican dollars; one other die, made of steel in and upon which then and there were made and impressed the figure resemblance and similitude of one of the sides, to wit, the reverse of the eagle side of the coin then and now current within the State of Illinois, called Mexican dollars; two crucibles, made of sand and clay, made use of in counterfeiting the coin then and now current within the State aforesaid, called Mexican dollars, then and there knowingly and unlawfully had in his custody and possession, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the State of Illinois.

> HUNTINGTON, State Attorney.34

[34. Miller v. The People, 3 Ill. 233. Form used in this case for indictment for having in possession instruments used in counterfeiting coin. It was held that the allegations were sufficiently descriptive of the offense and in conformity to the definition of the crime in the Criminal Code.]

# FORM 33.

# Disorderly House-Keeping of.

DISTRICT OF COLUMBIA, WASHINGTON COUNTY, TO WIT:

The jurors of the United States for the county aforesaid, upon their oath present, that Charles Columbus, late of the county aforesaid, yeoman, on the fifteenth day of December, in the year of our Lord eighteen hundred and thirtysix, at Washington county aforesaid, and on other days and times between that day and the day of taking this inquisition, with force and arms, kept a certain unlawful, disorderly and ill-governed house in the city of Washington, in the said county, as a common tavern, without any lawful authority or license therefor, did take upon himself to keep and maintain; and the said house did then and there, at the days and times aforesaid, keep as a common tipplinghouse: and did therein openly sell spirituous liquors to all persons calling for

the same, and allow the same to be drunk by such persons, in and about his said house at all times both at day and night, and on all days, both Sundays and other days; and did permit certain idle and ill-disposed persons to the jurors aforesaid unknown, to assemble together in his said house, and then and there continue drinking and tippling, to the common nuisance of the good people of the United States, to the evil example of all others, the corruption of the public morals and against the peace and government of the United States.

F. S. KEY, United States Attorney, District Columbia.<sup>25</sup>

[35. United States v. Columbus, 5 Cranch C. C. 304.]

# FORM 34.

# Disorderly House-Keeping of.

GARLAND COUNTY CIRCUIT COURT:

The State of Arkansas against H. A. Ballentine and Henry Thatcher—Indictment.

The grand jury of Garland county, in the name and by the authority of the State of Arkansas, accuse H. A. Ballentine and Henry Thatcher of the crime of keeping a disorderly house, committed as follows: The said H. A. Ballentine and Henry Thatcher, on the 15th day of March, 1886, in the county and State aforesaid, and on divers other days and times between that day and the day of the presentation of this indictment, a certain, common, ill-governed and disorderly house, unlawfully; did keep and maintain, and, in said house, for their own gain and lucre, certain evil-disposed persons, as well men as women, of evil name, fame and conversation, to come together, on the days and times aforesaid, there unlawfully and willfully did cause and procure; and the said persons in the said house, at unlawful times, as well in the night as the day, on the days and times aforesaid, there to be and remain drinking. tippling, cursing, swearing, quarreling, gambling, whoring and otherwise misbehaving themselves, unlawfully did permit and suffer, to the great injury and common nuisance of all the peaceable citizens of the State, there residing, inhabiting and passing; to the evil example of all others in the like case offending, to the great injury of public morals, the perversion of public justice, and against the peace and dignity of the State of Arkansas.

J. P. HENDERSON,

Prosecuting Attorney.36

[36. Thatcher v. State, 48 Ark. 60, 62.]

# FORM 35.

#### Disorderly House-Keeping of.

STATE OF NEW HAMPSHIBE, HILLSBOROUGH, SS .:

At the trial term of the Supreme Judicial Court, holden at Amherst, within and for the county of Hillsborough aforesaid, on the first Tuesday of September, in the year of our Lord one thousand eight hundred and sixty:

The grand jurors for the State of New Hampshire, upon their oath present, that James M'Gregor, of Manchester, in the said county of Hillsborough, on the first day of January, in the year of our Lord one thousand eight hundred and sixty, at Manchester aforesaid, in the county aforesaid, and on divers other days and times between that day and the twenty-second day of June, now last past, a certain common, ill-governed and disorderly house then and there unlawfully did keep and maintain, and in the said house, for his own lucre and gain, certain persons, as well men as women, of cvil name, fame and conversation, to come together on the days and times aforesaid, there unlawfully and wilfully did cause and procure, and the said persons, in the said house, at unlawful times, as well in the night as in the day, on the days and time aforesaid, there to be and remain drinking, whoring and otherwise misbehaving themselves, unlawfully did permit and still doth permit, to the great damage and common nuisance of all the peaceable citizens of said State there residing, inhabiting and passing, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

A. F. STEVENS,

Solicitor.37

[37. State v. M'Gregor, 41 N. H. 407, 409.]

# FORM 36.

#### Disorderly House-Keeping of.

STATE OF NORTH CAROLINA, GREENE COUNTY—SUPERIOR COURT OF LAW, FALL TERM, 1864.

The jurors for the State, upon their oath present, that John Patterson, late of the county of Green, on the 1st day of August, 1845, and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at and in the county aforesaid, did keep and maintain a certain common ill-governed and disorderly house, and, in his said house, for his own lucre and gain, certain persons, as well free as slaves, to frequent and come together, then and on the said other days and times, there unlawfully and wilfully did cause and procure, and the said persons in his said house at unlawful times, as well in the night as in the day, then and on the said other days and times, there to be and remain, drinking, tippling and misbehaving

themselves unlawfully and wilfully did permit, and doth permit, to the great damage and common nuisance of all the citizens of the State there inhabiting, residing and passing, to the evil example of all others in like case offending, and against the peace and dignity of the State.<sup>38</sup>

[38. State v. Patterson, 7 Ired L. (N. C.) 70.1

# FORM 37.

#### Embezzlement.

The jurors for the Commonwealth of Massachusetts, on their oath present, that Nathan P. Pratt, late resident of Reading, in the county of Middlesex and Commonwealth aforesaid, on the first day of October, in the year of our Lord one thousanl eight hundred and seventy-eight, was, and for the space of six months next following said first day of October continued to be an officer. to wit, the treasurer, of the Reading Savings Bank, which was then and there an incorporated company duly and legally established, organized and existing as a corporation under and by virtue of the laws of said Commonwealth, he, the said Nathan P. Pratt, not being during any part of the time aforesaid an apprentice of said Reading Saving Bank, and not being during any part of the time aforesaid a person under the age of sixteen years; and that said Nathan P. Pratt on the first day of October, in the year one thousand eight hundred and seventy-eight, at Reading, aforesaid, in the county aforesaid, did by virtue of his said office as treasurer as aforesaid, and while he continued and was employed in his said office as treasurer as aforesaid, have, receive and take into his possession certain money to a large amount, to wit, to the amount of twenty thousand dollars, and of the value of twenty thousand dollars; sundry bank bills amounting in the whole to twenty thousand dollars, and of the value of twenty thousand dollars; sundry bank checks for money. amounting in the whole to twenty thousand dollars, and of the value of twenty thousand dollars; sundry promissory notes, amounting in the whole to twenty thousand dollars, and of the value of twenty thousand dollars; sundry bills of exchange, amounting in the whole to twenty thousand dollars, and of the value of twenty thousand dollars; sundry drafts for money, amounting in the whole to twenty thousand dollars, and of the value of twenty thousand dollars; and one hundred pieces of paper, said pieces of paper being securities for money, each of the value of one thousand dollars, all of the goods, property and money of said Reading Savings Bank; and the said money, bank bills, checks, promissory notes, bills of exchange, drafts and pieces of paper, then and there unlawfully, fraudulently and feloniously did embezzle and convert to his own use, without the consent of said Reading Savings Bank. Whereby, and by force of the statute in such case made and provided, the said Nathan P. Pratt is deemed to have committed the crime of simple larceny.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Nathan P. Pratt, on said first day of October, in the year eighteen hundred and seventy-eight, at Reading aforesaid, in manner and form aforesaid, the said money, bank bills, checks, promissory notes, bills of exchange, drafts and pieces of paper, the property of said Reading Savings Bank, from the said Reading Savings Bank feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided.

2. And the jurors aforesaid, on their oath aforesaid, do further present, that the said Nathan P. Pratt, late resident of Reading, in the county of Middlesex aforesaid, on the thirty-first day of October, in the year of our Lord one thousand eight hundred and seventy-eight, at said Reading, in the county of Middlesex aforesaid, being then and there an officer, to wit, the treasurer, of the Reading Savings Bank, the same being then and there an incorporated company duly and legally established, organized and existing by the laws of said Commonwealth, he, the said Nathan P. Pratt, not being then and there an apprentice to the said Reading Savings Bank, nor a person under the age of sixteen years, did then and there, by virtue of his said office and employment as treasurer as aforesaid, have, receive and take into his possession a certain paper writing containing a conveyance of land, the same being then and there a deed of mortgage of certain land situate in said Reading, before then made and executed by David P. Brown to said Reading Savings Bank, and delivered to said Reading Savings Bank by said David P. Brown, and given to secure to said Reading Savings Bank the payment of the sum of two thousand dollars, which said deed of mortgage was then and there of the value of two thousand dollars; one promissory note given by said David P. Brown to the said Reading Savings Bank or order, as payee, for the sum of two thousand dollars, for the payment of money, and dated the twentieth lay of October, in the year of our Lord one thousand eight hundred and seventy, and of the value of two thousand dollars; two pieces of paper writing, of the value of two thousand dollars each piece, all of the property, goods and chattels of said Reading Savings Bank, and the said mortgage deed of land and promissory note, and pieces of paper writing, he, the said , Nathan P. Pratt, then and there unlawfully, fraudulently and feloniously did embezzle and fraudulently convert to his own use, without the consent of said Reading Savings Bank. Whereby, and by force of the statute in such case made and provided, the said Nathan P. Pratt is deemed to have committed the crime of simple larceny. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Nathan P. Pratt then and there, in manner and form aforesaid, the aforesaid mortgage deed of land, promissory notes and pieces of paper writing, of the property, goods and chattels of the said Reading Savings Bank, feloniously did steal, take and carry away, contrary to the form of statute in such case made and provided."

And the jurors aforesaid, on their oath aforesaid, do further present, that the said Nathan P. Pratt, late resident of Reading, in the county of Middlesex aforesaid, on the thirty-first day of October, in the year of our

#### Precedents of Forms.

Lord one thousand eight hundred and seventy-eight, at said Reading, in the county of Middlesex aforesaid, being then and there the treasurer of the Reading Savings Bank, a corporation then and there duly and legally established, organized and existing under and by virtue of the laws of said Commonwealth as an incorporated bank, did, by virtue of his office and employment of treasurer and whilst he, the said Nathan P. Pratt, was employed in said office of treasurer, have, receive and take into his possession a certain paper writing containing a conveyance of land, the same being then and there a deed of mortgage of certain land situate in said Reading, before then made and executed by Sarah P. Brancroft to said Reading Savings Bank and delivered to said Reading Savings bank by said Sarah P. Bancroft, and given to secure to said Reading Savings Bank the payment of the sum of five hundred dollars, which said deed of mortgage was then and there of the value of five hundred dollars; one promissory note given by said Sarah P. Bancroft to the said Reading Savings Bank or order, as payee, for the sum of five hundred dollars, and dated the twenty-first day of January, in the year of our Lord one thousand eight hundred and seventy-five, and of the value of five hundred dollars; two pieces of paper writing, the same being securities for money, of the value of five hundred dollars each piece, all of the property, goods and chattels of said Reading Savings Bank in their banking house there situate being, and the said mortgage deed of land, promissory note and pieces of paper writing, he, the said Nathan P. Pratt, then and there unlawfully, fraudulently and feloniously did embezzle and fraudulently convert to his own use, in the banking house aforesaid, without the consent of said Reading Savings Bank. Whereby and by power of the statute in such case made and provided, the said Nathan P. Pratt is deemed to have committed the crime of simple larceny. And so the jurors aforesaid, on their oath aforesaid, do say that the said Nathan P. Pratt then and there, in manner and form aforesaid, the aforesaid mortgage deed of land, promissory note, and pieces of paper of the property, goods and chattels of the said Reading Savings Bank, feloniously did steal, take and carry away in the banking house aforesaid against the peace of the commonwealth aforesaid, and contrary to the form of the statute in such case made and provided." The 4th, 6th, 9th, 10th, 11th, 12th, 20th and 21st counts followed the form of the third count. The 5th, 7th, 8th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 22d, 23d and 24th counts followed the form of the second count.39

[39. Commonwealth v. Pratt, 137 Mass. 99.]

# FORM 38.

#### Embezzlement.

PROVIDENCE, SC.:

At the Court of Common Pleas of the State of Rhode Island and Providence Plantations, holden at Providence, within and for the county of Provi-

dence, on the first Monday of December, in the year of our Lord one thousand eight hundred and eighty-two.

The grand jurors of the State of Rhode Island and Providence Plantations, and in and for the county of Providence, upon their oaths present:

That James A. Taberner, of Providence, in said county, yeoman, on the third day of February, in the year of our Lord one thousand eight hundred and eight-two, with force and arms at Providence aforesaid, in the aforesaid county of Providence, being then and there the clerk and agent of James Higgin and another, did then and there by virtue of his said employment, have, receive and take into his possession certain money to a large amount, to wit, to the amount of seventeen hundred dollars and of the value of seventeen hundred dollars, of the property and money of the said James Higgin and another, the said James A. Taberner's employers, and the said James A. Taberner the said money then and there feloniously did embezzle and fraudulently convert to his own use, without the consent of the said James Higgin and another, the said James A. Taberner's said employers, whereby and by force of the statute in such case made and provided the said James A. Taberner is deemed guilty of larceny. And so the jurors aforesaid upon their oaths aforesaid do say that the said James A. Taberner then and there, in manner and form aforesaid, the said money, of the property and money of the said James Higgin and another, the said James A. Taberner's said employers. from the said James Higgin and another feloniously did steal, take, and carry away, against the form of the statute in such case made and provided and against the peace and dignity of the State.40

[40. State v. Taberner, 14 R. I. 273.]

# FORM 39.

#### False Pretenses-Obtaining Goods Under.

In the Pope Circuit Court—The State of Arkansas Against John Johnson—Indictment.

The grand jury of Pope county, in the name and by the authority of the State of Arkansas, accuse John Johnson of a felony, committed as follows, to wit:

The said John Johnson, on the nineteenth day of July, A. D. 1880, in the county and State aforesaid, unlawfully, feloniously, and designedly, did falsely pretend to one D. M. Mourning that he, the said John Johnson, was then in the employ of one W. R. Kiger, and was then sent by the said W. R. Kiger to the said D. M. Mourning, for one pair of shoes (the said W. R. Kiger then and long before being well known to the said D. M. Mourning and G. H. Mourning, in their business and way of trade as merchants), by reason of which said false pretenses, the said John Johnson did then and

there unlawfully obtain from the said D. M. Mourning, one pair of shoes, of the value of two dollars and twenty-five cents of the joint goods and chattels of the said D. M. Mourning and G. H. Mourning, with intent then and there to cheat and defraud them, the said D. M. Mourning and G. H. Mourning, of the same, whereas in truth, and in fact, the said John Johnson was not then sent by the said W. R. Kiger to the said D. M. Mourning for the pair of shoes aforesaid. Against the peace and dignity of the State of Arkansas.<sup>41</sup>

[41. Johnson v. State, 36 Arkansas, 243, holding that the use of the generic term felony instead of naming the particular offense it is intended to charge is inaccurate and objectionable but that where the particular offense intended to be charged is made distinct and certain by the statement of the facts and circumstances of its commission, the indictment will be good though such term is used in naming the offense.]

#### FORM 40.

#### False Pretenses-Obtaining Money by.

CITY AND COUNTY OF NEW YORK, SS.:

The jurors of the people of the State of New York, in and for the body of the city and county of New York, upon their oath, present:

That James K. Cooke, late of the first ward of the city of New York, in the county of New York, aforesaid, broker, on the seventh day of December, in the year of our Lord one thousand eight hundred and sixty-three, at the ward, city and county aforesaid, with force and arms, on the day and year last aforesaid, with intent feloniously to cheat and defraud one John J. Robinson, did then and there feloniously, unlawfully, knowingly and designedly, falsely pretend and represent to him, the said John J. Robinson, that he, the said James K. Cooke, was then and there a captain in the Sixth New York Cavalry and that he, the said James K. Cooke, was then and there enlisting soldiers by authority of the United States Government, for his company, to wit, a company in the said cavalry; and the said John J. Robinson, then and there believing the said false pretenses and representations so made as aforesaid by the said James K. Cooke, and being deceived thereby, was induced, by reason of the false pretenses and representations so made as aforesaid, to deliver, and did then and there deliver to the said James K. Cooke, an amount of bounty money, to wit, a sum of two hundred and fifty dollars, in the lawful money of the United States, of the proper moneys, valuable things, goods, chattels, personal property and effects of the said John J. Robinson, and the said James K. Cooke did then and there designedly receive and obtain the said sum of money of the said John J. Robinson, of the proper moneys, valuable things, goods, chattels, personal property and effects of the said John J. Robinson, by means of the false pretenses and representations aforesaid, and with intent feloniously to cheat and defraud the said John J.

Robinson of the said sum of money; whereas in truth and in fact the said James K. Cooke was not then and there a captain in the Sixth New York Cavalry; and whereas, in fact and truth, he, said James K. Cooke, was not then and there enlisting soldiers by authority of the United States government for his company, to wit, a company in said cavalry; and whereas in fact and in truth, the pretenses and representations so made as aforesaid by the said James K. Cooke to the said John J. Robinson, was and were in all respects utterly false and untrue, to wit, on the day and year last aforesaid, at the ward, city and county aforesaid; and whereas, in fact and in truth, the said James K. Cooke, well knew the said pretenses and representations so by him made, as aforesaid, to the said John J. Robinson, to be utterly false and untrue at the time of making the same.

And so the jurors aforesaid, upon their oath aforesaid, do say: that the said James K. Cooke, by means of the false pretenses and representations aforesaid on the day and year last aforesaid, at the ward, city and county aforesaid, feloniously, unlawfully, falsely, knowingly and designedly did receive and obtain from the said John J. Robinson, of the said sum of money, of the proper moneys, valuable things, goods, chattels, personal property and effects of the said John J. Robinson, with intent feloniously to cheat and defraud him of the same, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

A. OAKEY HALL,

District Attornev.42

[42. People v. Cooke, 6 Park. C. R. (N. Y.) 31.]

#### FORM 41.

#### False Pretenses-Obtaining Money by.

CITY AND COUNTY OF NEW YORK, SS.:

The jurors of the People of the State of New York, in and for the body of the city and county of New York, upon their oath present:

That Julius J. Smith, late of the first ward of the city of New York, in the county of New York aforesaid, well knowing that Rachel Stoeser, hereinafter mentioned, was then and there a customer, and in the habit of dealing with the firm of J. Riegelman & Deffaa, dealers in flour, doing business in said city, on the twenty-eighth day of October, in the year of our Lord one thousand eight hundred and sixty-two, at the ward, city and county aforesaid, with force and arms, on the day and year last aforesaid, with intent feloniously to cheat and defraud said Rachel, did then and there feloniously, unlawfully, knowingly and designedly, falsely pretend and represent to said Rachel that he, the said Julius, was then and there a salesman and agent for the said firm of J. Riegelman &

Deffaa, and that he, the said Julius, had then and there procured to be sent to said Rachel by said firm of J. Riegelman & Deffaa, ten barrels of flour and one bag of meal; and that he, the said Julius, had then and there full power and authority to collect and receive the price of said flour and meal from the said Rachel. And the said Rachel, then and there believing the said false pretenses and representations so made as aforesaid, by the said Julius, and being deceived thereby, was induced by reason of the false pretenses and representations so made as aforesaid, to deliver and did then and there deliver to the said Julius the sum of eighty-two dollars and seventy cents in money, of the value of eighty-two dollars and seventy cents of the proper moneys, valuable things, goods, chattels, personal property and effects of the said Rachel, and the said Julius did then and there designedly receive and obtain the said sum in money of the value aforesaid of the said Rachel, of the proper moneys, valuable things, goods, chattels, personal property and effects of the said Rachel by means of the false pretenses and representations aforesaid, and with intent feloniously to cheat and defraud the said Rachel of the said sum in money of the value aforesaid.

Whereas, in truth and in fact, the said Julius was not then and there a salesman and agent for the said firm of J. Riegelman & Deffaa and had not then and there procured to be sent to said Rachel by the said firm of J. Riegelman & Deffaa, ten barrels of flour and one bag of meal; and whereas, in truth and in fact, he, the said Julius, had not then and there any power and authority to collect and receive the price of said flour and meal from the said Rachel. And whereas, in fact and in truth, the pretenses and representations so made as aforesaid by the said Julius to the said Rachel, were in all respects utterly false and untrue, to wit, on the day and year last aforesaid, at the ward, city and county aforesaid. And whereas, in fact and in truth, the said Julius well knew the said pretenses and representations so by him made as aforesaid to the said Rachel, to be utterly false and untrue at the time of making the same.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Julius J. Smith, by means of the false pretenses and representations aforesaid, on the day and year aforesaid, at the ward, city and county aforesaid, feloniously, unlawfully, falsely, knowingly and designedly, did receive and obtain from the said Rachel the sum in money, of the value aforesaid of the proper moneys, valuable things, goods, chattels, personal property and effects of the said Rachel, with intent feloniously to cheat and defraud her of the same, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

A. OAKEY HALL, District Attorney,43

[43. People v. Smith, 5 Park. Cr. R. (N. Y.) 490.]

#### FORM 42.

# False Pretenses-Obtaining Money by.

CENTRAL CRIMINAL COURT, TO WIT:

The jurors for our Lady the Queen, upon their oath, present that heretofore and before, and at the time of the committing of the offense hereinafter mentioned, one C. R., acting in fraudulent collusion with one J. A., had retained and employed one W. I., then and still practicing as an attorney at law and solicitor in chancery, as the attorney and solicitor of the said C. R., to make application to the said J. A., for a certain debt of £68, then alleged by the said C. R. to be due to him from the said J. A. And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. A., afterwards and before the committing of the offense hereinafter mentioned, acting in fraudulent collusion with the said C. R., offered to and arranged with the said W. I., as such attorney and solicitor of the said C. R., as aforesaid, to discharge such alleged debt of £68, and also the further sum of £6 5s., for a certain other alleged debt upon the deeds hereinafter mentioned being delivered to him, the said J. A., which said deeds the said C. R., acting in fraudulent collusion with the said J. A., afterwards and before the committing of the offense hereinafter mentioned, proposed to place in the hands of the said W. I., as the attorney and solicitor of the said C. R., for the purpose of being so delivered to the said J. A. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. R., late of the parish of Saint George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, laborer, and the said J. A., late of the same place, laborer, being evil disposed persons, and devising and contriving, and wickedly combining and intending to deceive the said W. I. in the premises, and to obtain from the said W. I. the said sum of £68, and to cheat and defraud him of the same; afterwards, to wit, on the 20th day of November, A. D. 1850, at the parish of Saint George, Bloomsbury, aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly and designedly did falsely pretend to the said W. I. that he, the said J. A., was then really and truly indebted to the said C. R. in the said sum of £68 for money lent by the said C. R. to the said J. A.; that he, the said J. A., had then deposited with the said C. R. certain deeds relating to the property of the wife of the said J. A., for the purpose of securing payment of the said sum of £68 to the said C. R., but that the said C. R. afterwards had deposited such deeds with a friend of the said C. R., who had then advanced money upon the security of the same deeds to the said C. R., and then held the said deeds as such security as last aforesaid; that he, the said C. R., then wanted the said sum of £68 from the said W. I. for the purpose of recovering possession of the said deeds, and to enable him, the said C. R., to place the same in the hands of the said W. I., in order that the same might be redelivered to the said J. A. upon the pay-

#### Precedents of Forms.

ment by him to the said W. I. of the said sum of £68 pursuant to such offer and arrangement in that behalf as aforesaid; by means of which said several false pretenses they, the said C. R. and J. A., then and there, to wit, on the day and year aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly and designedly did fraudulently obtain of and from the said W. I., one order for the payment of money, to wit, for the payment, and of the value of £68, then and there being the property of the said W. I., and one piece of paper of the value of 1d. of the goods and chattels of the said W. I., with intent to cheat and defraud him of the same property, goods and chattels, and whereas in truth and in fact, the said J. A. was not then really and truly indebted to the said C. R. in the said sum of £68 as the said C. R. and J. A. so falsely pretended as aforesaid, either for money lent or any cause whatsoever. And whereas in truth and in fact, the said J. A. had not then deposited with the said C. R. certain deeds relating to the property of the wife of the said J. A. for the purpose of securing payment of the said sum of £68 to the said C. R., as the said C. R. and J. A. so falsely pretended as aforesaid, or of any sum of money whatever. And whereas in truth and in fact the said C. R. had not then deposited any such deeds as the said C. R. and J. A. so falsely pretended as aforesaid, with any friend of the said C. R. who had then advanced money upon the security of such deeds to the said C. R., or with any person whatsoever; nor did any such friend of the said C. R., as the said C. R. and J. A. so falsely pretended as aforesaid, then hold such deeds as a security for any money advanced to the said C. R., as the said C. R. and J. A. so falsely pretended as aforesaid. And whereas in truth and in fact the said C. R. did not then want the said sum of £68 from the said W. I., for the purpose of recovering possession of any such deeds as the said C. R. and J. A. so falsely pretended as aforesaid, or to enable him, the said C. R., to place such deeds in the hands of the said W. I., in order that the same might be redelivered to the said J. A., upon the payment by him to the said W. I. of the said sum of £68 pursuant to such offer and arrangement in that behalf as aforesaid. And whereas, in truth and in fect, the said alleged debt, and the said supposed deeds, had no existence whatsoever, but were pretended to have existence by the said C. R. and J. A. as aforesaid, for the purpose of deceiving, cheating and defrauding the said W. I. in manner aforesaid, and for no other purpose whatever, to the great injury and deception of the said W. I., to the evil and pernicious example of all other persons in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. R. and J. A., being evil disposed persons, and devising and contriving, and wickedly combining and intending to deceive the said W. I., and to obtain from the said W. I. the said sum of £68, and to cheat and defraud him of the same, afterwards, to wit, on the 20th day of November, A. D. 1850, at the parish of St. George, Bloomsbury, aforesaid,

in the county of Middlesex aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly and designedly did falsely pretend to the said W. I. that the said J. A. had before then deposited with the said C. R., certain deeds relating to the property of the wife of the said J. A., as a security for the payment to the said C. R. of the sum of £68; that he, the said C. R., had afterwards deposited such deeds with a friend of the said C. R., who had then advanced money to the said C. R. upon the security ' of the said deeds, and then held such deeds as such security as last aforesaid. And that the said C. R. then required the sum of £68 for the purpose of recovering possession of the said deeds, by means of which said several false pretenses in this count mentioned, they, the said C. R. and J. A., did then and there unlawfully, knowingly and designedly, fraudulently obtain of and from the said W. I. one order for the payment of money, to wit, for the payment of the sum of £68, then and there being of the value of £68, and the property of the said W. I.; and one piece of paper of the value of Id., of the goods and chattels of the said W. I., with intent to cheat and defraud the said W. I. of the said goods and chattels and property; whereas, in truth and in fact, the said J. A. had not deposited with the said C. R. such deeds relating to the property of the wife of the said J. A., as the said C. R. and J. A. so falsely pretended, as in this count mentioned. And whereas, in truth and in fact, the said C. R. had not deposited such deeds with any friend of him, the said C. R., as the said C. R. and J. A. so falsely pretended, as in this count mentioned. And whereas, in truth and in fact, no friend of the said C. R., nor any person whatsoever, had then advanced money to the said C. R. upon the security of the said deeds. And whereas, in truth and in fact, no friend of the said C. R., nor any other person whatsoever, then held such deeds as any security whatsoever. And whereas, in truth and in fact, the said C. R. did not then require the said sum of £68 or any sum of money whatsoever, for the purpose of recovering possession of such deeds as the said C. R. and J. A. so falsely pretended, as in this count mentioned. And whereas, in truth and in fact, such deeds had no existence whatsoever, but were so pretended by the said C. R. and J. A. to have existence as aforesaid, for the purpose of cheating and defrauding the said W. I. as aforesaid, and for no other purpose whatsoever, to the great injury and deception of the said W. I., to the evil and pernicious example of all other persons in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. A. and C. R., being such evil disposed persons as aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully and wickedly did conspire, combine, confederate and agree together, and with divers other evil disposed persons, whose names to the jurors aforesaid are as yet unknown, falsely and fraudulently to pretend and cause to appear to the said W. I., that the said J. A.

was then indebted to the said C. R. in the sum of £68, that the said J. A. had deposited with the said C. R. certain deeds relating to the property of the wife of the said J. A., as a security for the payment to the said C. R. of the said sum of £68; that the said C. R. had afterwards deposited such deeds with a friend of the said C. R., who had advanced money upon the security of the same, and by whom such deeds were then held; that the said J. A. was desirous of discharging the said debt due from him to the said C. R., upon the redelivery to him, the said J. A., of the said deeds, but that the said C. R. was then unable to procure the redelivery to him of the said deeds, for want of money to pay such money so advanced to him upon the security of the same, and to induce and persuade the said W. I., by means of the several false representations aforesaid, and upon the faith and confidence that such deeds really existed, and upon the promise and assurance of the said C. R. that he would deposit the said deeds with the said W. J., for the purpose of delivering the same to the said J. A., and receiving from the said J. A. such debt of £68, so to be pretended to be due from the said J. A. to the said C. R. to obtain from the said W. I. divers of the moneys of the said W. I. amounting to the sum of £68, for the pretended purpose of obtaining such deeds from such friend of the said C. R., and to cheat and defraud the said W. I. of the same, and mutually to aid and assist one another in carrying out and putting into execution the said unlawful and wicked combination, conspiracy, confederation and agreement; whereas in truth and in fact no such deeds as in this count mentioned, then or ever had any existence whatsoever, to the great injury and deception of the said W. J., to the evil and pernicious example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

Fourth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. A. and C. R., being such evil disposed persons as aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully and wickedly did conspire, combine, confederate and agree together, and with divers other evil disposed persons, whose names to the jurors aforesaid are as yet unknown, by divers false pretenses, and by divers false, artful, indirect, deceitful and fraudulent means, devices, arts, stratagems and contrivances to obtain and acquire into their hands and possession, of and from the said W. J. divers of his moneys, amounting to a large sum, to wit, the sum of £68, and to cheat and defraud him of the same, to the great injury and deception of the said W. J., to the evil and pernicious example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.44

[44. IV Cox Cr. Cas., Appendix XLI.]

## FORM 43.

# Forcible Trespass.

SUPERIOR COURT OF LAW, SPRING TERM, 1842.

STATE OF NORTH CAROLINA, ASHE COUNTY, SS .:

The jurors for the State, upon their oath, present that William Tolever, late of said county, laborer; Elizabeth Tolever, Caroline Tolever and Louisa Tolever, all late of said county, spinsters, on the 1st day of April, 1843, with force and arms into a certain yard and dwelling house then situate and being, and then and there in the possession of Polly Long, unlawfully, violently, forcibly and with a strong hand, did enter into, and then and there unlawfully, violently, forcibly and with a strong hand, did throw certain filth and dead carcasses into the said house, she, the said Polly, then and there being therein, and then and there did remain cursing, abusing and threatening the said Polly for a long time, to wit, for one half hour, and other wrongs then and there did, to the great terror of the said Polly Long, then and there being, and against the peace and dignity of the State.<sup>45</sup>

[45. State v. Tolever et al., 27 N. C. 452, holding that when the name of the county is mentioned in the margin of the indictment and it is stated that the dwelling house, on which the forcible trespass is alleged to have been committed was "there situate and being," this must refer to the county mentioned in the margin.]

## FORM 44.

#### Forgery.

The jurors for the commonwealth of Massachusetts, on their oath present, that Spencer Pettes, otherwise called F. S. Pettes, otherwise called Henry J. Woodford, of Boston aforesaid, on the eighteenth day of March, in the year of our Lord one thousand eight hundred and seventy-one, at Boston aforesaid, did falsely make, alter, forge and counterfeit a certain false, forged and counterfeit voucher, certificate and accountable receipt for money, which said voucher, certificate and receipt was of the tenor following; that is to say, 'Taunton, Mass., March 18th, 1871, No. 9. Mrs. Martha Woodford has deposited in the Machinists' National Bank of Taunton, Mass., ten thousand and one hundred and fifty-two dollars, to the credit of M. Bolles & Co., payable on return of this certificate properly endorsed. \$10,152. B. C. Vickery, Cashier.' With intent thereby then and there to injure and defraud: against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the Commonwealth of Massachusetts, on their oath aforesaid, do further present, that one Holden, whose first name is to the jurors unknown, of Boston aforesaid, on the eighteenth day of March, in the year of our Lord one thousand eight hundred and seventy-one, at Boston aforesaid, did utter and publish as true a certain false, forged, altered and counterfeit writing, voucher, certificate and accountable receipt for

money, which said writing, voucher, certificate and receipt was of the tenor following; that is to say, 'Taunton, Mass., March 18th, 1871. No. 9. Mrs. Martha Woodford has deposited in the Machinist's National Bank of Taunton, Mass., ten thousand one hundred and fifty-two dollars, to the credit of M. Bolles & Co., payable on return of this certificate properly endorsed. \$10,152. B. C. Vickery, Cashier.' He, the said Holden, then and there well knowing the said writing, voucher, certificate and receipt to be false, forged, altered and counterfeit, as aforesaid, with intent thereby then and there to injure and defraud; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, on their oath aforesaid, do further present, that Spencer Pettes, otherwise called F. S. Pettes, otherwise called Henry J. Woodford, late of Boston aforesaid, in the county aforesaid, before the said last-mentioned felony and uttering and publishing was committed, in manner and form aforesaid, to wit, on the seventeenth day of March in the year of our Lord one thousand eight hundred and seventy-one, at Boston aforesaid, did unlawfully, maliciously and feloniously counsel, hire, aid, move, encourage, command, incite and in other ways procure said Holden, so uttering and publishing as aforesaid, the said last-mentioned felony, and uttering and publishing in manner and form aforesaid, to do and commit; and thereby became and was then and there an accessory before the fact to the said last-mentioned felony and uttering and publishing, against the peace of the Commonwealth and the form of the statute in such case made and provided.46

[46. Pettes v. Commonwealth, 126 Mass. 242.]

# FORM 45.

#### Forgery.

COURT OF THE GENERAL SESSIONS OF THE PEACE, In and for the County of New York.

The People of the State of New York against James F. Dolan.

The grand jury of the county of New York, by this indictment, accuse James F. Dolan of the crime of forgery in the second degree, committed as follows:

The said James F. Dolan, late of the Borough of Manhattan, of the city of New York, in the county of New York aforesaid, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-seven, at the borough and county aforesaid, with intent to defraud, feloniously did forge a certain instrument and writing, which said forged instrument and writing is as follows, that is to say:

\$2,000.

New York, Oct. 13th, 1897.

Thirty days after date I promise to pay to the order of James F. Dolan two thousand dollars at the West Side Bank.

Value received.

No. Due,

THO. COCKERILL & SON.

against the form of the statute in such case made and provided and against the peace of the people of the State of New York and their dignity.

#### Second Count.

And the grand jury aforesaid, by this indictment, further accuse the said James F. Dolan of the crime of forgery in the second degree, committed as follows:

The said James F. Dolan, late of the borough and county aforesaid, on the day and in the year aforesaid, at the borough and county aforesaid, with intent to defraud, did feloniously utter, dispose of and put off as true a certain forged instrument and writing, being the same forged instruments and writing set forth in the first count of this indictment, to which reference is hereby made, the said James F. Dolan then and there well knowing the same to be forged, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

WM. TRAVERS JEROME.

District Attorney.47

[47. In People v. Dolan, 186 N. Y. 4, 78 N. E. 569, the conviction of the defendant in the above indictment was affirmed.]

## FORM 46.

#### Forgery.

COURT OF GENERAL SESSIONS.

The People of the State of New York against James O'Farrell.

The grand jury of the county of New York, by this indictment, accuse James O'Farrell of the crime of forgery in the second degree, committed as follows: The said James O'Farrell, late of the Borough of Manhattan, of the city of New York, in the county of New York, aforesaid, on the 23d day of December, in the year of our Lord one thousand nine hundred and one, at the borough, city and county aforesaid, with intent to defraud, feloniously did

forge a certain instrument and writing which said forged instrument and writing is as follows. That is to say:

## SPERRY & ALEXANDER COMPANY,

CUTLERY,

HARDWARE SPECIALTIES.

New York, December 23, 1901.

THE SEVENTH NATIONAL BANK.

Pay to the order of Fred Wilson, three hundred and eighty-nine dollars No. 7,763. \$389.50.

# SPERRY & ALEXANDER COMPANY,

R. J. ALEXANDER.

against the form of the statute in such case made and provided and against the peace of the people of the State of New York, and their dignity.

#### Second Count.

The grand jury aforesaid, by this indictment, further accuse the said James O'Farrell of the crime of forgery in the second degree, committed as follows: The said James O'Farrell, late of the borough, city and county aforesaid, afterward, to wit, on the day and in the year aforesaid, at the borough, city and county aforesaid, with intent to defraud, did feloniously utter, dispose of and put off as true, a certain instrument and writing, being the same forged instrument and writing set forth in the first count of this indictment, to which reference is hereby made, the said James O'Farrell then and there well knowing the same to be forged, against the form of the statute in such case made and provided and against the peace of the people of the State of New York and their dignity.

WILLIAM TRAVERS JEROME,
District Attorney.48

[48. In People v. O'Farrell, 175 N. Y. 323, 67 N. E. 588, a judgment of conviction was reversed but not on the ground of any defect in the indictment.]

# FORM 47.

#### Forgery.

CITY AND COUNTY OF NEW YORK, SS .:

The jurors of the people of the State of New York, in and for the body of the city and county of New York, upon their oath present: That George B. Clements, late of the first ward of the city of New York, in the county of New York, aforesaid, on the 3d day of September, in the year of our Lord one thousand eight hundred and sixty-one, with force and arms, at the ward, city and county of New York, aforesaid, feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counter-

feited, and willingly aid and assist in the false making, forging and counterfeiting, a certain instrument and writing, commonly called a bank check, which said false, forged and counterfeited instrument and writing is as follows, that is to say:

"No. 492.

Jersey City, Sept. 3, 1861.

THE BANK OF JERSEY CITY.

Pay to the order of Livermore, Clews & Mason twenty-four hundred sixty-six dollars ninety-three cents.

> M. BARKER & SON. Certified by Sparks, Bank J. C.

\$2,466.93."

With intent to injure and defraud Charles F. Livermore, Henry Clews and Henry M. Mason, and divers other persons to the jurors aforesaid unknown, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said George B. Clements, late of the ward, city and county aforesaid, afterward, to wit, on the day and year last aforesaid, with force and arms, at the ward, city and county aforesaid, feloniously and falsely did utter and publish as true, with intent to injure and defraud the said Charles F. Livermore, Henry Clews and Henry M. Mason, and divers other persons to the jurors aforesaid unknown, a certain false, forged and counterfeited instrument in writing, commonly called a bank check, which said last mentioned false, forged and counterfeited instrument and writing is as follows, that is to say:

" No. 492. THE BANK OF JERSEY CITY.

Jersey City, Sept. 3, 1861.

Pay to the order of Livermore, Clews & Mason twenty-four hundred sixty-six dollars ninety-three cents.

> M. BARKER & SON. Certified by Sparks, Bank J. C.

\$2,466.93."

The said George B. Clements, at the said time he so uttered and published the last mentioned false, forged and counterfeited instrument and writing, as aforesaid, then and there well knowing the same to be false, forged and counterfeited, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

WILSON J. WATERBURY,

District Attorney.49

[49. Clements v. The People, 5 Park. Cr. Rep. (N. Y.) 337, 338. used in this case for indicting for forgery in the third degree, in forging and uttering a bank check.]

# FORM 48.

#### Forgery.

CITY AND COUNTY OF NEW YORK, SS.:

The jurors of the people of the State of New York, in and for the body of the city and county of New York, upon their oath present: That John W. Thoms, late of the first ward of the city of New York, in the county of New York, aforesaid, otherwise called Johan W. Thoms, on the 17th day of December, in the year of our Lord one thousand eight hundred and fifty-two, with force and arms, at the ward, city and county aforesaid, feloniously had in his custody and possession, and did receive from some person or persons to the jurors aforesaid unknown, a certain false, forged, altered and counterfeited negotiable promissory note for the payment of money, commonly called a bank note, purporting to have been issued by a certain corporation or company called the Southport Bank, duly authorized for that purpose by the laws of the State of Connecticut, which said last mentioned false, forged, altered and counterfeited negotiable promissory note for the payment of money, was theretofore altered from a valid note of the same bank, for the payment of and of the denomination of one dollar, and which altered note is as follows:

**'** 5

State of Connecticut.

5

" B.

No. 5389.

"The Southport Bank will pay "Fiv"e Dollar to the Bearer on demand.

"Southport, Sept. 2, 1851.

I. ALVORD, Pres."

" F. D. PERRY, Cash."

with intention to utter and pass the same as true and to permit, cause and procure the same to be so uttered and passed, with intent to injure and defraud divers persons to the jurors aforesaid unknown, he the said John W. Thoms, then and there well knowing the said last mentioned false, forged, altered and counterfeited promissory note, for the payment of money, to be false, forged, altered and counterfeited as aforesaid, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

N. BOWDITCH BLUNT,

District Attorney.50

[50. People v. Thoms, 3 Park. Cr. R. (N. Y.) 256. Form used in this case for having in possession an altered and forged bank bill, with intent to pass the same, the bill purporting to have been issued by a bank in another State.]

## FORM 49.

#### Hindering an Officer.

STATE OF VERMONT, CHITTENDEN COUNTY, SS.:

Be it remembered, that at a county court, begun and holden at Burlington. within and for the county of Chittenden, on the third Tuesday of September, A. D. 1881, the grand jurors within and for the body of the county of Chittenden aforesaid, now here in court duly empaneled and sworn, upon their oath present that Eugene Carpenter and Thomas Fassett, of Burlington, in the county of Chittenden, on the, to wit, 12th day of September, A. D. 1881, at Burlington, in said county of Chittenden, with force and arms, in and upon Joseph A. Larose, then and there being a police officer of the city of Burlington, in the county of Chittenden aforesaid, under the authority of the State, did an assault make by then and there beating him, the said Joseph A. Larose, with fists, clubs, feet and sticks, and did then and there by means of which impede and hinder the said Joseph A. Larose, police officer aforesaid, while in the execution of his said office of police officer as aforesaid, and while he as such police officer was engaged in attempting to quell and quiet a disturbance of the public peace between them, the said Eugene Carpenter and Thomas Fassett, and other persons to the grand jurors aforesaid at present unknown, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.52

[52. State v. Carpenter, 54 Vt. 552, holding that the above indictment to be insufficient as charging the crime of hindering an officer under the statute, but sufficient as charging the crime of assault and battery upon an officer.]

## FORM 50.

#### House-Breaking.

STATE OF WEST VIRGINIA, WOOD COUNTY, TO WIT:

In the Circuit Court of said County.

The grand jurors of the State of West Virginia, in and for the body of the said county of Wood, and now attending said court, upon their oaths present that Fred Betsall on the fifteenth day of March in the year of our Lord one thousand eight hundred and seventy-seven, in the said county, did feloniously break and enter a certain outhouse, called a barn, and used and occupied as a wareroom, the property of one W. P. Maddox, and not adjoining to or occupied with the dwelling house of the said W. P. Maddox, with the intent the goods and chattels of the said W. P. Maddox, in the said out-house, called a barn, and used and occupied as a wareroom, then and there being, feloniously to steal, to take, and carry away sixteen opossum skins, of the value of four dollars (\$4.00), and thirty-five skunk skins, of the value of twenty dollars (\$20.00), of the value of twenty

four dollars (\$24.00), of the goods and chattels of the said W. P. Maddox, in the said out-house, called a barn, and used and occupied as a wareroom, there and then being found, did feloniously steal, take and carry away, against the peace and dignity of the State. Upon the information of Bur Harden, Chas. H. Wood and DeL. Davis, sworn in open court, and sent to the grand jury to give evidence on this indictment.

D. H. LEONARD, Prosecuting Attorney.<sup>53</sup>

[53. State v. Betsall, 11 W. Va. 703, 705.]

## FORM 51.

## Ill-Fame-Keeping House of.

[See forms for keeping Bawdy-House and Disorderly House.]

STATE OF VERMONT, CHITTENDEN COUNTY, SS.:

The grand jurors for the people of the State of Vermont, upon their oath present, that George Nixon, late of Burlington, in the county of Chittenden, on the first day of May, in the year of our Lord one thousand eight hundred and forty-four, and on divers other days and times between that day and the day of taking this inquisition, with force and arms, at Burlington aforesaid, in the county of Chittenden aforesaid, feloniously a certain house of illfame, commonly called a bawdy-house, resorted to for the purposes of prostitution and lewdness, unlawfully and wickedly did keep and maintain and in the said house, for filthy lucre and gain, divers evil disposed persons, as well men as women and whores, on the days and times aforesaid, as well in the night as in the day, there unlawfully and wickedly did receive and entertain, and in which said house the said evil disposed persons and whores, by the consent and procurement of the said George Nixon, on the days and times aforesaid, there did commit whoredom and fornication, whereby divers unlawful assemblies, riots, routs, affrays, disturbances and violation of the peace and dreadful filthy and lewd offenses in the same house, on the days and times aforesaid, as well in the night as in the day, were there committed and perpetrated, to the great damage and common nuisance of all the good citizen's of this State, to the evil example of all others in like cases offending, in manifest destruction and subversion of morality and good manners, contrary to the form, force and effect of the ninth section of the ninety-ninth chapter of the last Revised Statutes of this State, and against the peace and dignity of the State.54

[54. State v. Nixon, 18 Vt. 70, 71, holding that the offense is local and should be described as committed in a particular town and declaring that the precedents for this offense usually state as in this case that it was kept for pecuniary gain or profit.]

## FORM 52.

## Interstate Commerce - Offering, Granting and Giving a Rebate.

NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION, SCT.:

The grand jurors for the United States of America, inquiring for the Northern Division of the Northern District of Illinois, upon their oath present, that before and on the first day of August, in the year nineteen hundred and three, and throughout the period of time from that day until and on the third day of March, in the year nineteen hundred and five, The Lake Shore and Michigan Southern Railway Company was a corporation organized and existing under and by virtue of the laws of the State of Illinois, and was a common carrier engaged in the transportation of property wholly by railroad, in interstate commerce, over its railway route,-that is to say, from points in the State of Ohio and Indiana to the city of Chicago, in the State, and in the said Northern Division of the said Northern District, of Illinois; that during the said period the said corporation common carriers, as required by law, kept open for public inspection its printed tariffs and schedules showing the rates and charges for the transportation of property, including petroleum and products of petroleum, which the said corporation common carrier established, and which were then in force and upon its said route, and filed copies of such tariffs and schedules with the Interstate Commerce Commission of the said United States, and that so the said The Lake Shore and Michigan Southern Railway Company, during the said period, was a corporation common carrier subject to the provisions of the Act of Congress, approved February 4, 1887, entitled "An Act to regulate commerce," and also to the acts of Congress amendatory of the said act; and, further, that the said tariffs and schedules so published and filed as aforesaid showed, amongst other things, in connection with the transportation of petroleum and products thereof, the charges for the storage of such property by the said corporation common carrier at the said city of Chicago, when transported by it as aforesaid from points in the said States of Ohio and Indiana to the said city of Chicago,-that is to say, that the charges for such storage were the same as those established by the Chicago Car Service Association, viz., five cents per ton per day, after such property was held by the said corporation common carrier, forty-eight hours beyond the time of its arrival, without being removed by the consignees thereof.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that during a portion of the period of time aforesaid, to wit, during the month of August, in the year nineteen hundred and three, and while the said tariffs and schedules of rates and charges, so published and filed as aforesaid, were still in force as aforesaid on the said route of the said corporation common carrier, a large quantity of such petroleum and products, to wit, eight thousand and nineteen tons thereof, was by the said corporation common carrier transported from Whiting, in the said State of Indiana, to the

said city of Chicago, in the said State of Illinois, and conducted into and through the said division and district, consigned to the Standard Oil Company, a corporation theretofore organized and then existing under and by virtue of the laws of the said State of Indiana, and during the last-named month was so held in storage, for the benefit of the said Standard Oil Company, consignee thereof as aforesaid, by the said corporation common carrier, in connection with such transportation, and before the removal of the said property from the depot warehouse of the said corporation common carrier at that city, by the said consignee, that storage charges, in all amounting to the sum of four hundred dollars and ninety-five cents, in due course of business lawfully accrued to the said corporation common carrier under and according to the terms of the said tariffs and schedules, and should thereupon have been there collected by the said corporation common carrier from the said Standard Oil Company, and paid by the said Standard Oil Company to the said corporation common carrier, in due course of business, to wit, at Chicago aforesaid, in the division and district aforesaid, on the first day the then next succeeding month of September, and a lawful debt and liability on that account that day arose against the said Standard Oil Company in favor of the said corporation common carrier.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said first day of September, in the year nineteen hundred and three, at Chicago aforesaid, in the said Northern Division of the said Northern District of Illinois (the said storage charges so then and there having accrued to the said corporation common carrier and the said debt and liability so having arisen in its favor against the said Standard Oil Company, in connection with the said interstate transportation of the said property, and the said storage charges then still remaining uncollected and unpaid), the said Standard Oil Company unlawfully did accept and receive from the said corporation common carrier an unlawful rebate and concession, in respect of the said transportation of the said property in the said interstate commerce, in the shape of a cancellation of the said debt and liability and a release of itself, the said Standard Oil Company, from the same, then and there by the said corporation common carrier made for the benefit of, and tendered to, the said Standard Oil Company, whereby, and by which device, the said property was transported as aforesaid at a rate and charge less than that named in the tariffs and schedules aforesaid by the amount of the said storage charges, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

#### Second Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that throughout the period of time in the first count of this indictment specified, the said The Lake Shore and Michigan Southern Railway Company, corporation as in the said first count alleged, was a corporation common carrier as in the same count set forth, and one subject to the provisions of the acts of Congress in that count mentioned, and as such corporation common car-

rier then published and filed with the Interstate Commerce Commission of the said United States, as required by law and as set forth in the said first count, its printed tariffs and schedules of rates and charges for the transportation of petroleum and products thereof in the interstate commerce in the said first count described, showing the charges for storage, in connection with such transportation, in the said first count mentioned; and that during another portion of the said period, to wit, during the month of September, in the year nineteen hundred and three, and while the said tariffs and schedules were still in force on the said route of the said corporation common carrier, another large quantity of such petroleum and products of petroleum, to wit, eight thousand five hundred and sixty tons thereof, was by the said corporation common carrier transported from Whiting aforesaid, in the said State of Indiana, to the said city of Chicago, in the said State of Illinois, and conducted into and through the said Northern Division of the said Northern District of Illinois, consigned to the said Standard Oil Company, corporation as in the said first count alleged, and during the last-named month was so held in storage at that city, for the benefit of the said Standard Oil Company, consignee thereof as aforesaid, by the said corporation common carrier, in connection with the said transportation of the same, and before the removal of the same from the depot warehouse of the said corporation common carrier at the said city by the said consignee, that other storage charges, in all amounting to the sum of four hundred and twenty-eight dollars, in due course of business lawfully accrued to the said corporation common carrier under the said tariffs and schedules, to wit, at Chicago aforesaid, in the division and district aforesaid, on the first day of the then next succeeding month of October, in the same year, and a lawful debt and liability on that account on the last-mentioned day arose against the said consignee in favor of the said corporation common carrier.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said first day of October, in the year nineteen hundred and three at Chicago aforesaid, in the said Northern Division of the said Northern District of Illinois (the storage charges in this count of this indictment mentioned so then and there having accrued to the said corporation common carrier, and the debt and liability in this count mentioned so having arisen in its favor against the said Standard Oil Company, in connection with the said interstate transportation of the property in this count described, and those storage charges then still remaining uncollected and unpaid), the said Standard Oil Company unlawfully did accept and receive from the said corporation common carrier a certain unlawful rebate and concession, to wit, a rebate and concession, in respect of the said transportation in the said interstate commerce of the property in this count mentioned, in the shape of a cancellation of the debt and liability in this count described, and a release of itself, the said Standard Oil Company, from the same, then and there by the said corporation common carrier made for the benefit of and tendered to

the said Standard Oil Company, whereby, and by which device, that property was transported as aforesaid at a rate and charge less than that named in the said tariffs and schedules by the amount of the last-mentioned storage charges; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.<sup>55</sup>

[55. Form used in United States v. Standard Oil Co., 148 Fed. 719.]

## FORM 53.

#### Interstate Commerce - Offering, Granting and Giving a Rebate.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE NORTH-EBN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

Of the July Term, in the year nineteen hundred and six.

NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION, SCT.:

The grand jurors for the United States of America, inquiring for the Northern Division of the Northern District of Illinois, upon their oath present, that before and on the first day of September, in the year nineteen hundred and three, and throughout the period of time from that day until and on the first day of March, in the year nineteen hundred and five, the Chicago and Alton Railway Company was a corporation organized and existing under and by virtue of the laws of the State of Illinois, and was a common carrier engaged in the transportation of property by railroad, over its railway route from Whiting, in the State of Indiana, to East St. Louis, in the State of Illinois, under a common arrangement with a certain other corporation common carrier, to wit, the Chicago Terminal Transfer Railroad Company, a corporation under the laws of the State of Illinois, for a continuous carriage and shipment of property, in interstate commerce, from Whiting aforesaid to East St. Louis aforesaid, over the connecting railroads of the said corporation common carriers, that is to say, over the railroad of the said Chicago Terminal Transfer Railroad Company from Whiting aforesaid to Chappell, in the said division and district, and over the railroad of the said Chicago and Alton Railway Company from Chappell aforesaid to East St. Louis aforesaid; that so the said Chicago and Alton Railway Company, during the said period, was a corporation common carrier subject to the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to regulate commerce," and also to the acts of Congress amendatory of the said act: that during the said period the said Chicago and Alton Railway Company, as required by law, kept open for public inspection, to wit, at Whiting and Chappell aforesaid, its printed tariffs and schedules showing the rates and charges for the transportation of property in the interstate commerce aforesaid, which the said Chicago and Alton Railway Company established and which were then in force upon its said route, and, as required by law, filed

copies of such tariffs and schedules with the Interstate Commerce Commission of the said United States; which said tariffs and schedules so published and filed as aforesaid, showed the rate and charge for the transportation of certain kinds of such property, to wit, petroleum and products of petroleum, in carload lots, from Whiting aforesaid to East St. Louis aforesaid, by the said route, to be eighteen cents for each one hundred pounds thereof; and that all of the foregoing facts were, throughout the said period, well known to the Standard Oil Company, hereinafter mentioned.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that within the period of time aforesaid, to wit, on the said first day of September, in the year nineteen hundred and three, and while the said tariffs and schedules of rates and charges, so published and filed as aforesaid, were still in force as aforesaid on its said route, the said Chicago and Alton Railway Company unlawfully did engage in the transportation, in interstate commerce, to wit, from Whiting aforesaid, through the said Northern Division of the said Northern District of Illinois, to East St. Louis aforesaid, over the said railway route, for and on account, and pursuant to the request of the Standard Oil Company, a corporation theretofore organized and then existing under the laws of the State of Indiana, of a large quantity, to wit, 77,971 pounds of a certain product of petroleum known as refined oil. in a tank car of the Union Tank Line Company, numbered 9401, at a total rate and charge to the said Standard Oil Company, for such transportation thereof, of six cents for each one hundred pounds, under a common arrangement between the said Chicago and Alton Railroad Company and the said Chicago Terminal Transfer Railroad Company for a continuous carriage and shipment of the said refined oil from Whiting aforesaid to East St. Louis aforesaid, over the said railway route, in the same tank car, without stoppage or interruption, at Chappell aforesaid or elsewhere, for the purpose of unloading, reloading or transhipment, which said arrangement then and there was one under which the said refined oil was, during such transportation, accompanied by a written switching way-bill and a way-bill indicating that the same was being switched and transported from Whiting aforesaid to Chappell aforesaid by the said Chicago Terminal Transfer Railroad Company, and transported from Chappell aforesaid to East St. Louis aforesaid by the said Chicago and Alton Railway Company.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Standard Oil Company, corporation as aforesaid, on the said first day of September, in the year nineteen hundred and three, at and within the said Northern Division of the said Northern District of Illinois, in manner and form aforesaid, unlawfully did knowingly accept and receive from the said Chicago and Alton Railway Company a concession in respect of the transportation of certain of its, the Standard Oil Company's, property, in interstate commerce, whereby, and by which device, that property was transported, in such interstate commerce, at a less rate than that named in the tariffs so, as required by the said act to regulate commerce and the said acts

amendatory thereof, published and filed by the said Chicago and Alton Railway Company; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Standard Oil Company, corporation as in the first count of this indictment set forth, within the period of time in that count mentioned, that is to say, on the day of , in the year nineteen hundred and , at and within the said Northern Division of the said Northern District of Illinois, under the circumstances and conditions described in the said first count, in manner and form as in that count specified, unlawfully did knowingly accept and receive from the said Chicago and Alton Railway Company, a corporation and common carrier as in the said first count alleged, a concession in respect of the transportation of certain other of its, the said Standard Oil Company's, property in the interstate commerce in the said first count described, to wit, of pounds of , product of petroleum on that day transported by the said Chicago and Alton Railway Company from Whiting aforesaid, through the said Northern Division of the said Northern District of Illinois, to East St. Louis aforesaid, by the route in the said first count described, in a tank car of the Company, numbered , at a total rate and charge to the said Standard Oil Company for such transportation of the property in this count mentioned of six cents for each one hundred pounds thereof; whereby and by which device, that property was transported, in such interstate commerce, at a less rate than that named in the tariffs in the said first count mentioned. so published and filed by the said Chicago and Alton Railway Company as in that count set forth; against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Standard Oil Company, corporation as in the first count of this indictment set forth, within the period of time in that count mentioned, that is to say, on the day of , at and within the said Northern Division of nineteen hundred and the said Northern District of Illinois, under the circumstances and conditions described in the said first count, in manner and form as in that count specified, unlawfully did knowingly accept and receive from the said Chicago and Alton Railway Company, corporation and common carrier as in the said first count alleged, a concession in respect of the transportation of certain other of its, the said Standard Oil Company's, property in the interstate commerce in the said first count described, to wit, of , a product of petroleum, on that day transof ported by the said Chicago and Alton Railway Company from Whiting aforesaid, through the said Northern Division of the said Northern District of

Illinois, to East St. Louis aforesaid, by the route in the said first count described, in a tank car of the Company, numbered , at a total rate and charge to the said Standard Oil Company, for such transportation of the property in this count mentioned, of six cents for each one hundred pounds thereof; whereby, and by whuch device, that property was transported, in such interstate commerce at a less rate than that named in the tariffs in the said first count mentioned, so published and filed by the said Chicago and Alton Railway Company as in that count set forth; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.<sup>56</sup>

[56. Form used in United States v. Standard Oil Co., 148 Fed. 719.]

# FORM 54.

# Interstate Commerce—Unlawful Combination in Restraint of Trade and Commerce.

IN THE CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
For the Southern District of New York.

Of the May Term, in the year nineteen hundred and six.

First Count.

SOUTHERN DISTRICT OF NEW YORK, SCT .- The grand jurors for the United States of America, inquiring for the Southern District of New York, upon their oath present, that on the eighth day of December, in the year nineteen hundred and three, and during a period of time from that day until and on the present eighteenth day of June, in the year nineteen hundred and six, the MacAndrews and Forbes Company, a corporation theretofore organized and then existing under and authorized by the laws of the State of New Jersey, and the J. S. Young Company, a corporation theretofore organized and then existing under and authorized by the laws of the State of Maine, hereafter in this indictment called corporation defendants, did carry on business as dealers in licorice paste, such licorice paste being a valuable article of merchandise, useful in the manufacture of plug and smoking tobaccos and of snuff and cigars; that Karl Jungbluth and Howard E. Young, hereafter in this indictment called individual defendants, were officers, that is to say, the presidents, of the said MacAndrews and Forbes Company and the said J. S. Young Company respectively, and in their capacity as such officers, and on behalf and by authority of those corporations respectively, during the period of time in this indictment aforesaid, did carry on the business aforesaid; that the said MacAndrews and Forbes Company manufactured the licorice paste so dealt in by it as aforesaid at two factories maintained by it, one located in the city of Newark and the other in the city of Camden, in

the State of New Jersey, and the said J. S. Young Company manufactured the licorice paste so dealt in by it as aforesaid at a manufactory maintained by it in the city of Baltimore, in the State of Maryland; that in carrying on the said business the said corporation and individual defendants, did sell large quantities of such licorice paste to manufacturers of plug and smoking tobaccos, snuff and cigars, throughout the said United States, and, in pursuance of such sales, did ship such licorice paste from their said respective factories to such manufacturers of plug and smoking tobaccos, snuff and cigars, in other States of the said United States than those wherein the said factories were situated as aforesaid, to wit, in the States of Illinois, Kentucky, Louisiana, Michigan, Missouri, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, Massachusetts, California and Indiana; and that in so carrying on the said business in the manner aforesaid, the said defendants, during the period aforesaid, were engaged in trade and commerce among the States of this Union, within the meaning of the Act of Congress approved July 2, 1890, and entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that of the total volume of the said interstate business, trade and commerce then so being carried on by the said defendants and by other dealers in such licorice paste who were their competitors, the said corporation defendants together had and controlled the principal part, that is to say, eighty-five per centum, thereof, of which eighty-five per centum the said Mac-Andrews and Forbes Company had and controlled nine-tenths and the said J. S. Young Company one-tenth; and that, because the said defendants and their said competitors, during the said period, were in fact separate and distinct each from every other, they should severally, during the said period, have conducted their said interstate business, trade and commerce each in competition with the others, as to prices at which they should sell the said licorice paste, as to the extent of such interstate business, trade and commerce to be secured and carried on by each of them, as to the customers they should each obtain for such licorice paste among such manufacturers of plug and smoking tobaccos, snuff and cigars, and as to the terms and conditions of sale of such licorice paste in, such interstate business, trade and commerce, and would, during the same period, have so conducted their said interstate business, trade and commerce if the said corporation and individual defendants had not engaged in the unlawful combination in restraint thereof in this indictment next mentioned.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said corporation and individual defendants, during the period aforesaid, at and within the city of New York, in the said Southern District of New York, in violation of the provisions of the said Act of Congress, unlawfully did knowingly engage in a combination in restraint of the said interstate business, trade and commerce so during the said period being car-

ried on in the manner aforesaid by them and by certain of their said comepetitors, whereby the said business, trade and commerce was restrained in the several ways and by the several means now here set forth and described, that is to say:

- (1) Competition as to the prices at which the said licorice paste was sold and delivered by the said corporation defendants, between the said corporation defendants, and among them severally and their said several competitors in the said interstate business, trade and commerce, was prevented and destroyed, (a) by the said corporation and individual defendants agreeing among themselves that there should be no such competition, (b) by the said corporation and individual defendants from time to time agreeing upon, establishing, fixing and maintaining arbitrary and noncompetitive prices for the said licorice paste so sold and delivered by the said corporation defendants in the interstate business, trade and commerce aforesaid, (c) by their selling and delivering such licorice paste, in that business, trade and commerce, at such arbitrary and noncompetitive prices, (d) and by their inducing certain of their said competitors, to wit, one John D. Lewis, of Providence. Rhode Island, and the Weaver & Sterry, Limited, of New York city, New York, likewise to establish and maintain arbitrary and noncompetitive prices in the said interstate business, trade and commerce of such two lastnamed competitors; which said arbitrary and noncompetitive prices so agreed upon established, fixed and maintained by the said corporation and individual defendants and by their said competitors, were greatly in excess of the prices which would at such times have prevailed for the said licorice paste in the said interstate business, trade and commerce of the said corporation defendants and of their said competitors, or of any of them, if the said corporation and individual defendants had not engaged in the said unlawful combination.
- (2) A division and an apportionment of the said interstate business, trade and commerce, and of the customers of the said defendant corporations, were made between the said defendant corporations, the exact details and nature of which said division and apportionment are to the said grand jurors as yet unknown, except, first, that in consequence of the same the said J. S. Young Company was allowed the profits on the sale of twenty thousand cases, each containing two hundred and fifty pounds, of the said licorice paste annually, whether it sold that quantity or not, and except, second, that it was such a division and apportionment as gave to the said MacAndrews and Forbes Company as customers substantially all of said manufacturers of plug and smoking tobaccos, snuff and cigars, who were then members of a certain so-called trust, popularly known as the Tobacco Trust (consisting, amongst other companies, of the Continental Tobacco Company, the American Tobacco Company, the American Snuff Company, the P. Lorillard Company and the R. J. Reynolds Tobacco Company), and to the said J. S. Young Company as customers substantially all of the said manufacturers of plug and smoking

tobacco, snuff and cigars, who were not members of the said trust, and who were popularly known as the Independent Tobacco Manufacturers.

- (3) The said corporation and individual defendants contrived and managed so that the said John D. Lewis agreed with the said J. S. Young Company that he would not sell more than one million pounds of such licorice paste during the year 1904, one million and fifty thousand pounds during the year 1905 and one million and one hundred thousand pounds during the year 1906, it being provided by the said agreement that if he should sell more than the said amounts during the said years respectively, he was to pay to the said J. S. Young Company an amount of money approximately equal to his profits upon the quantity sold by him in excess of such amounts respectively, and that he should establish and maintain arbitrary and noncompetitive prices, as above set forth, for all licorice paste sold by him; the terms and conditions of which said agreement were, during the period in this indictment first mentioned, duly complied with by him the said John D. Lewis, by his selling large quantities of such licorice paste at such prices.
- (4) The terms and conditions upon and under which, during the said period, sales of such licorice paste were made by the said corporation defendants, in respect to discounts and times of payment for, and of delivery of, such licorice paste, and in respect to the form and character of all contracts under which the same was sold, were made non-competitive as between the said corporation defendants, in the said interstate business, trade and commerce, pursuant to agreement by and among the said corporation and individuel defendants.

#### Overt Acts.

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And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, in pursuance of the said unlawful combination, and to effect the object of the same, and as an act on its part of engaging in the same, the said MacAndrews and Forbes Company, corporation as aforesaid, on the said eighth day of December, in the year nineteen hundred and three, and during the period of time aforesaid, at and within the city of New York, in the Southern District of New York, unlawfully did cause its corporate name to be signed as a party, and its corporate seal to be affixed, to a certain paper writing, to wit, a paper writing of the tenor following, that is to say:

"THIS CONTRACT AND AGREEMENT made and entered into this, the eighth day of December, 1903, by and between

MacAndrews and Forbes Company, a corporation organized and existing under and by virtue of laws of the State of New Jersey, party of the first part;

J. S. Young Company, a corporation organized and existing under and by virtue of the laws of the State of Maine, party of the second part; and

Joseph C. Stevens, Chas. I. Thayer and Howard E. Young, for themselves and any and all other present or future holders of the preferred stock of said party of the second part, parties of the third part:

#### Witnesseth:

That whereas, by contract of October 27th, 1903, to which J. S. Young Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, was party of the first part, and party of the first part hereto was party of the second part, it was provided that a corporation should be organized to take over the assets and business of said J. S. Young Company, said New Jersey corporation, and it was further provided that the covenants hereinafter made and set out by party of the first part should be made, and that in consideration therefor said party of the first part hereto should receive from said J. S. Young Company, said New Jersey corporation, two thousand shares of the common stock of said corporation to be formed, and

Whereas, said new corporation provided by said contract of October 27, 1903, to be formed, has been formed and is the corporation that is party of the second part hereto;

Now, therefore, this contract and agreement witnesseth

That for and in consideration of the premises and of two thousand shares of the common stock of said party of the second part, the receipt whereof through said J. S. Young Company, said New Jersey corporation, is hereby acknowledged, and other good, valuable and sufficient considerations to said party of the first part moving from said party of the second part and parties of the third part, the receipt whereof is hereby fully acknowledged, party of the first part has covenanted and agreed, and it does hereby covenant and agree to and with party of the second part and parties of the third parts, as follows:

First: That party of the first part will cause and procure to be paid by party of the second part unto the holders of the preferred stock of party of the second part, each and every semi-annual instalment of a dividend at the rate of six per centum per annum on the preferred stock of said party of the second part for the period of ten years, counting with January 1, 1904, and ending December 31, 1913, the first of said dividends to be paid as soon after June 30, 1904, as the books of said party of the second part can be audited, in order to show profits made by it, and in the same way each six months thereafter until the expiration of said ten years, and in the event that profits earned by said party of the second part are not sufficient to pay such dividends, then said party of the first part will pay the same to the holders of such preferred stock.

Second: If, during the year 1904, the party of the second part does not sell 20,000 cases of extract of licorice, party of the first part shall, during the month of January, 1905, pay to said party of the second part an amount equal to the profit made by party of the first part as an average on a number of cases equal to the deficiency of said party of the second part in its output and sale as compared with 20,000 cases. To illustrate: if said party of the second part, during the year 1904, sells only 19,000 cases of licorice extract, and if the average profit of party of the first part during said year 1904 on its licorice output is \$4 a case, then the party of the first part, during January, 1905, shall pay to the party of the second part an amount equal to the average profit of party of the first part, to wit: \$4 multiplied by the deficiency of party of the second part, to wit: 1,000 cases; that is, the sum of \$4,000. And said party of the first part shall make good any deficiency in the sales by party of the second part as compared with said 20,000 cases for the preceding year, in each January, for ten successive years, the last of such payments to be in January, 1914. Said party of the first part also hereby covenants that the directors of said party of the second part from time to time selected and elected by party of the first part, by virtue of its large stockholding in said party of the second part, shall not, without the concurrence of the whole board of directors of said party of the second part, reduce the price of licorice extract to be manufactured and sold by party of the second part below a fair and normal price, and it is hereby agreed that such fair and normal price below which the product of said party of the second part is not to be sold, without the concurrence of the whole of its board of directors, shall be the price at the time being paid to party of the first part by Continental Tobacco Company, its largest customer, for extract of licorice. It is further understood and agreed that the cases of extract of licorice referred to in this paragraph are cases of about 250 pounds each.

Third: This contract and covenant shall not be, nor be deemed to be, personal, but its burdens shall be borne by said party of the first part and its successors and assigns, and it shall enure to the benefit of said party of the second part and its successors and assigns, for the benefit of said party of the second part and its present or future stockholders. The covenant set out herein shall not be abrogated, altered or amended except by written consent of said party of the second part and all the holders of the preferred stock of said party of the second part at the time of such proposed abrogation, alteration or amendment.

It witness whereof, and of all the foregoing, said party of the first part has caused this instrument to be signed in its corporate name by its president, and its corporate seal to be by him affixed, attested by its assistant secretary; and said party of the second part has caused its corporate name to be hereunto signed by its president and its corporate seal to be by him affixed,

attested by its ; and said parties of the third part have hereunto signed their names and affixed their seals.

All done in triplicate, the day and year first above written.

MACANDREWS AND FORBES COMPANY.

(Seal) By Karl Jungbluth,

President.

Attest:

E. F. HALE, Asst. Sect'y.

## J. S. YOUNG COMPANY.

By HOWARD E. YOUNG,

President.

Attest:

JOHN S. YOUNG. )
(Seal.)

JOSEPH C. STEVENS (L.S.)

CHAS I. THAYER (L.S.)

HOWARD E. YOUNG (L.S.)

STATE OF NEW YORK, COUNTY OF NEW YORK, SS..

Before me, the undersigned authority, this day personally appeared Karl Jungbluth, with whom I am personally acquainted, who being by me first duly sworn, says: That he is a resident of the city, county and State of New York; that he is president of MacAndrews and Forbes Company, party of the first part to the foregoing instrument and agreement; that as such president, he signed the corporate name of said MacAndrews and Forbes Company to said foregoing instrument and attached the corporate seal of said corporation thereto being duly authorized by the favorable vote of at least two-thirds of the directors of said MacAndrews and Forbes Company at a regular adjourned meeting of the board of directors of said company held at its office in New York city on the 8th day of December, 1903, at which meeting a quorum was present. And he acknowledged the foregoing instrument as the act and deed of said MacAndrews and Forbes Company.

Witness my hand and notarial seal at office this 8th day of December, 1903.

M. E. FINCH,

Notary Public No. 24, in and for County and State of New York."

(Notarial seal.)

2.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful combination, and to effect the object of the same, and as an act on its part of engaging in the same, the said J. S. Young Company, corporation as aforesaid, on the said eighth day of December, in the year nineteen hundred and three, and

during the period of time first mentioned in this indictment, at and within the said city of New York, in the said Southern District of New York, unlawfully did cause its corporate name to be signed as a party, and its corporate seal to be affixed, to the said paper writing so herein above set forth according to its tenor.

3.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful combination, and to effect the object of the same, and as an act on his part of engaging in the same, the said Karl Jungbluth, on the said eighth day of December, in the year nineteen hundred and three, and during the period of time aforesaid, at and within the said city of New York, in the said Southern District of New York, in his capacity as president of the said MacAndrews and Forbes Company, and on behalf and by authority of the said MacAndrews and Forbes Company, unlawfully did sign his name, to wit, "Karl Jungbluth," to the said paper writing; he the said Karl Jungbluth then and there, to wit, at the time and place when and where he so as aforesaid signed his name to the said paper writing, well knowing his act in the premises to be an act in pursuance and to effect the object of the said unlawful combination and an act on his part of engaging in the said unlawful combination.

4

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful combination, and to effect the object of the same, and as an act on his part of engaging in the same, the said Howard E. Young, on the said eighth day of December, in the year nineteen hundred and three, and during the period of time aforesaid, at and within the said city of New York, in the said Southern District of New York, in his said capacity as president of the said J. S. Young Company, and on behalf and by authority of the said J. S. Young Company, unlawfully did sign his name, to wit, "Howard E. Young," to the said paper writing; he the said Howard E. Young then and there, to wit, at the time and place when and where he so as aforesaid signed his name to the said paper writing, well knowing his act in the premises to be an act in pursuance and to effect the object of the said unlawful combination and an act on his part of engaging in the same.

5.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful combination, and to effect the object of the same, and as an act on its part of engaging in the same, the said J. S. Young Company, on the thirty-first day of December, in the year nineteen hundred and three, and during the period of time aforesaid, at the said city of New York, in the said Southern District of New York, unlawfully did, in its corporate name, signed thereto by the said

Howard E. Young, its president, execute a certain writing and contract, to wit, a writing and contract of the tenor following, that is to say:

#### "CONTRACT

Agreed by and between the J. S. Young Company, a corporation duly organized under the laws of the State of Maine, and having its principal business office at Baltimore, in the State of Maryland; and John D. Lewis, of Providence, in the State of Rhode Island, as follows:

1. Said J. S. Young Company promises to purchase of and from the said John D. Lewis, any part of the entire quantity of licorice paste that shall be manufactured by him for five years, beginning on the first day of January, 1904, and terminating December 31, 1908, which he shall not sell within said five years to any other persons or corporations, at a price giving to him a net profit equal to what may be realized by him therefor under the provisions of this agreement, it being hereby agreed that such net profit shall not during that period of time be less than one cent per pound, and that said profit shall be recalculated annually between the first day of October and the first day of January on the basis of a pure licorice paste containing not more than 25% water, costing six and three-fourth cents per pound when made from 50% Persian root costing £6 10s. per ton, and 50% Anatolian or Syrian or Russian root costing £9 per ton, said cost of roots being understood as per ton of 2240 pounds actual net weight ex dock Providence, and for roots of usual good merchantable quality upon the following terms and conditions, namely:

The maximum amount of licorice paste to be produced by said John D. Lewis is to be, however, one million pounds during the calendar year 1904, with the right on his part to increase the production thereof at the rate of fifty thousand pounds during each succeeding year of said five years, so that during the calendar year 1908 it may amount to one million two hundred thousand pounds: Provided, nevertheless, that nothing herein contained shall prevent the said John D. Lewis from fulfilling all such contracts for the making and delivery of licorice paste as may now exist between himself and any other persons or corporations, although deliveries under them are to be made subsequent to the first day of January, 1904, but the total amount thereof required to make such deliveries after January 1st, 1904, shall be deducted from the maximum amount hereinabove specified.

Said J. S. Young Company shall pay to the said John D. Lewis for all such licorice paste seven and three-fourth cents per pound F. O. B. Providence (except a higher amount as hereinafter provided), while the actual cost of roots to said John D. Lewis does not exceed £9 per ton for Anatolian or Syrian or Russion, and £6 10s. per ton for Persian, as hereinbefore stipulated.

2. And in case during said period of five years there should be an advance in the cost of said roots to the said John D. Lewis, then the said J. S.

Young Company shall thereupon pay to him a correspondingly increase price for said licorice paste so that his net profit thereon under any such advanced cost of roots shall be not less than it will be under the foregoing provisions of this agreement with the selling price to said J. S. Young Co. at seven three-fourth cents per pound and with the cost of roots as above quoted.

- 3. In case the said J. S. Young Company advances its selling price above eight cents per pound, it shall also advance the price it is to pay the said John D. Lewis for licorice paste delivered thereafter, up to an amount per pound equal to one-fourth of a cent less than the regular selling price of the J. S. Young Co. It is the purpose of this agreement that the price paid by the J. S. Young Company shall be one-fourth of a cent per pound less than the ruling prices of the J. S. Young Company, with the express condition, however, that the minimum price to be paid by the J. S. Young Company shall be such as to give said John D. Lewis a profit of not less than one cent per pound.
- 4. Said John D. Lewis shall give notice to the said J. S. Young Company on the first business days of July and January, or within ten days thereafter, during each year of said five years, beginning in July, 1904, of the quantity of licorice paste (not exceeding his maximum production thereof hereinabove limited), remaining unsold during the preceding six months which under the foregoing terms of this agreement the said J. S. Young Company is to take from him, whereupon the said J. S. Young Company shall notify the said John D. Lewis whether it (said company) will accept delivery of such unsold licorice paste or pay to him his profit thereon, as hereinafter provided; and in case the said J. S. Young Company elects to accept delivery of said licorice paste, the same shall be tendered to said J. S. Young Company by him within three months after July 1st and January 1st in each year of said five years, and the same shall be received and paid for by the said J. S. Young Company at the price to be fixed in manner aforesaid.
- 5. All licorice paste tendered to the said J. S. Young Co. under this agreement shall be pure extract of licorice roots, and shall contain not more than 25% water.
- 6. Said J. S. Young Company shall have the privilege, nevertheless, instead of receiving the licorice paste remaining unsold, as aforesaid, to pay to the said John D. Lewis in lieu thereof a sum of money equal to his calculated net profit on such unsold paste, which profit shall be the difference between the manufactured cost of licorice paste, to be determined as above specified, and the minimum selling price of same for the preceding six months, and not less in any event than one cent per pound.
- 7. Said J. S. Young Company are to furnish John D. Lewis as called for by the latter during the aforesaid five years, a quantity of licorice roots of suitable quality, sufficient for the manufacture of the maximum quantity of licorice paste hereinbefore agreed upon, at actual cost, it being agreed,

however, in case the said John D. Lewis should be offered such roots from other sources at prices below what the said J. S. Young Company will furnish same to him for, that he may purchase said roots of other parties, if, after giving notice to the said J. S. Young Company of such lower prices, it (said company) should decide not to furnish him with such roots at such lower prices. Said John D. Lewis is to give to the said J. S. Young Company notice in December and (or) January in each year of said five years of the quantity of licorice roots which he will require shipped to him during the ensuing year, and such roots shall be shipped by the said J. S. Young Co. during the summer and autumn following such last mentioned notice.

- 8. In consideration of the advantages to be derived by the said John D. Lewis under the above provisions of this agreement, he hereby promises to pay to the said J. S. Young Company, semiannually in July and January during the said five years, one quarter of his net profits, calculated as hereinbefore provided for, on his entire output of licorice paste, exclusive of the quantity required to fill sales made previous to January 1st, 1904.
- 9. If any differences in accounting hereunder should occur between the parties hereto, the same are to be referred to a public accountant for adjustment.
- 10. In the event that the said J. S. Young Company should at any time during said five years sell out its business to any third party, said John D. Lewis shall have the option of cancelling this agreement, such cancellation to take effect on the first day of the month following notice given on his part of his desire to so cancel same. In the event that said John D. Lewis sells out his business to any third party, this agreement shall run with the business, so that the purchaser thereof shall become liable to all the burdens hereby imposed on said John D. Lewis, and entitled to all his benefits.

In testimony whereof, the said J. S. Young Company has caused this instrument to be signed by its president for this purpose duly authorized, and the said John D. Lewis has subscribed his name hereto, on this thirty-first day of December A. D. 1903.

In presence of:

C. ASKEW.

J. S. YOUNG COMPANY, Per Howard E. Young,

In presence of:

Prest.

JOHN B. LEWIS.

JOHN D. LEWIS."

6.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful combination, and to effect the object of the same, and as an act on his part of engaging in the same, the said Howard E. Young, on the said thirty-first day of December, in the year nineteen hundred and three, and during the period of time aforesaid, at and within the said city of New York in the said Southern District of New York unlawfully did, as president of the said J. S. Young Company, sign his name, to wit, "Howard E. Young." to the writing and contract herein immediately above set forth according to its tenor; he the said Howard E. Young then and there knowing the character and contents of the said writ-

ing and contract, and well knowing his act of so signing his name to the same to be an act in pursuance and to effect the object of the said unlawful combination, and an act on his part of engaging in the same combination.<sup>55</sup>

[55. Other overt acts are alleged under numbers 7-65 inclusive, consisting mostly of letters and various communications, which we have here omitted.] And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said corporation and individual defendants, during the period of time first aforesaid, at and within the said city of New York, and in the said Southern District of New York, in manner and form aforesaid, unlawfully did engage in a combination in restraint of trade and commerce among the several States: Against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

#### Second Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said eighth day of December, in the year nineteen hundred and three, and during the said period of time from that day until and on the said eighteenth day of June, in the year nineteen hundred and six, the said MacAndrews and Forbes Company, J. S. Young Company, Karl Jungbluth and Howard E. Young, the corporation and individual defendants in the first count of this indictment mentioned, in the places and in the manner and under the circumstances in that count particularly set forth, did carry on business as dealers in licorice paste, and so were engaged in trade and commerce among the States of this Union, within the meaning of the said Act of Congress approved July 2, 1890, and entitled "An Act to protect trade and commerce against unlawful restraints and monopolies;" and that, because the said corporation defendants and their competitors in the said interstate business, trade and commerce, during the period aforesaid, were in fact separate and distinct from each other, they should severally then have conducted their said business, trade and commerce each in competition with the other, as to prices at which they sold the said licorice paste, as to the extent of such business, trade and commerce secured and carried on by them respectively, as to the obtaining of customers respectively for such licorice paste among such manufacturers of plug and smoking tobaccos, snuff and eigars, and as to the terms and conditions of sale of such licorice paste in such business, trade and commerce, and would, during the said period, have so conducted their said interstate business, trade and commerce, if the said corporation and individual defendants had not engaged in the unlawful conspiracy in restraint thereof in this count of this indictment next mentioned.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said corporation and individual defendants, during the period of time aforesaid, to wit, on the said eighth day of December, in the year nineteen hundred and three, at and within the said city of New York,

and in the said Southern District of New York, in violation of the provisions of the said Act of Congress, unlawfully did knowingly conspire together, and engage in a conspiracy among themselves, in restraint of the said interstate business, trade and commerce so carried on by the said corporation and individual defendants, during the said period, as in this count of this indictment above set forth, and in restraint of the like interstate business, trade and commerce so being carried on by certain of the competitors of the said corporation defendants during the same period; which said unlawful conspiracy in this count mentioned then and there was a conspiracy for restraining the said interstate business, trade and commerce of the said corporation and individual defendants and of their said competitors in the several ways and by the several means now here set forth and described, that is to say:

- (1) Competition between the said corporation defendants, and between them severally and their said competitors severally, in the said interstate business, trade and commerce, as to the prices at which the said licorice paste was to be sold and delivered by the said corporation defendants, was to be prevented and destroyed, (a) by the said corporation and individual defendants agreeing among themselves that there should be no such competition, (b) by the said corporation and individual defendants from time to time agreeing upon, establishing, fixing and maintaining arbitrary and noncompetitive prices for such licorice paste so to be sold and delivered by them in such interstate business, trade and commerce, (c) by their selling and delivering such licorice paste in that business, trade and commerce, at such arbitrary and non-competitive prices, (d) and by their inducing certain of their said competitors, to wit, one John D. Lewis, of Providence, Rhode Island, and the Weaver & Sterry, Limited, of New York city, New York, likewise to establish and maintain arbitrary and non-competitive prices in the said interstate business, trade and commerce of such two last named competitors; which said arbitrary and non-competitive prices so to be agreed upon, established, fixed and maintained by the said corporation and individual defendants and by their said competitors were to be greatly in excess of the prices which would at such times have prevailed for the said licorice paste, in the said interstate business, trade and commerce of the said corporation defendants and of their said competitors, if the said corporation and individual defendants had not engaged in the said unlawful conspiracy.
  - (2) A division and apportionment of the said interstate business, trade and commerce, and of the customers of the said defendant corporation, was to be made between the said defendant corporations, the exact details and nature of which said division and apportionment are to the said grand jurors as yet unknown, except, first, that according to the same J. S. Young Company was to be allowed the profits on the sale of twenty thousand cases, each containing two hundred and fifty pounds, of the said licorice paste annually, whether it should sell that quantity or not, and except, second, that it was to be such a division and apportionment as would give to the said MacAndrews and Forbes Company, as customers, substantially all of the said

manufacturers of plug and smoking tobaccos, snuff and cigars, who were then members of a certain so-called trust, popularly known as the Tobacco Trust (consisting, amongst other companies, of the Continental Tobacco Company, the American Tobacco Company, the American Snuff Company, the P. Lorillard Company and the R. J. Reynolds Tobacco Company), and as would give to the said J. S. Young Company, as customers, substantially all of the said manufacturers of plug and smoking tobaccos, snuff and cigars, who were not members of the said trust and who were popularly known as the Independent Tobacco Manufacturers.

- (3) The said corporation and individual defendants were to induce the said John D. Lewis to agree with the said J. S. Young Company that he would not sell more than one million pounds of such licorice paste during the year 1904, one million and fifty thousand pounds during the year 1905, and one million and one hundred thousand pounds during the year 1906, under an agreement whereby if he should sell more than the said amounts during the said years respectively, he would pay to the said J. S. Young Company an amount of money approximately equal to his profits upon the quantity sold by him in excess of such amounts respectively; and the said corporation and individual defendants were also to induce the said John D. Lewis to establish and maintain arbitrary and non-competitive prices, as aforesaid, for all licorice paste sold by him.
- (4) The terms and conditions upon and under which, during the said period, sales of such licorice paste were to be made by the said corporation defendants, in respect of discounts and the times of payment for and of delivery of, such licorice paste, and in respect of the form and character of all contracts under which the same were to be sold, were to be made non-competitive as between the said corporation defendants, in the said interstate business, trade and commerce.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that in pursuance and to effect the object of the said unlawful conspiracy in this count mentioned, the said MacAndrews and Forbes Company, J. S. Young Company, Karl Jungbluth and Howard E. Young, at the several times and places in that connection mentioned in the said first count of this indictment, unlawfully did severally knowingly commit the several overt acts set forth in that count as being overt acts committed by them in pursuance and to effect the object of the unlawful combination in that count described, and as being acts on their part of engaging in the said unlawful combination.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said corporation and individual defendants, on the said eighth day of December in the year nineteen hundred and three, and during the period of time in this indictment aforesaid, at and within the said city of New York, and in the said Southern District of New York, in manner and form in this count aforesaid, unlawfully did knowingly engage in a conspiracy in restraint of trade and commerce among the several States; against the peace and dignity

of the said United States, and contrary to the form of the statute of the same in such case made and provided.

#### Third Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said corporation and individual defendants named in the first count of this indictment, under the circumstances and conditions in that count particularly set forth, in and by engaging, during the period of time in the same count specified and in the manner there described, in the unlawful combination in the same count mentioned and described, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts in the said first count set forth, unlawfully did, during the said period, and at the said city of New York, in the said Southern District of New York, knowingly attempt to monopolize the part in the said first count mentioned and described of the trade and commerce among the several states of this Union, that is to say, the interstate trade and commerce in licorice paste there mentioned; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

HENRY L. STIMSON,
United States Attorney.
HENRY W. TAFT,
Spl. Asst. U. S. Attorney.<sup>57</sup>

[57. United States v. MacAndrews & Forbes Co., 149 Fed. 823. This indictment was under the act of Congress, approved July 2, 1890, known as the "Anti-Trust Law."]

## FORM 55.

#### Interstate Commerce-Offering, Granting and Giving a Rebate.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA For the Southern District of New York, in the Second Circuit.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the City of New York, within and for the District and Circuit aforesaid, on the third Wednesday of June, in the year of our Lord one thousand nine hundred and six, and continued by adjournment to and including the tenth day of August, in the year of our Lord one thousand nine hundred and six.

SOUTHERN DISTRICT OF NEW YORK, SS.:

The jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath present that at the times herein mentioned The Delaware, Lackawanna & Western Railroad Company (hereinafter called

the Lackawanna Railroad Company) was, and still is, a railroad corporation duly organized under and existing by virtue of the laws of the State of Pennsylvania, and was a common carrier engaged in the transportation of passengers, freight and property for hire over a continuous line and route from the city of New York, in the State of New York, by way of the Southern District of New York, to and through the State of New Jersey, and thence to and through the State of Pennsylvania, and thence to the city of Buffalo, in the State of New York, partly by railroad and partly by water, under a common control, management and arrangement for a continuous carriage and shipment, and at all such times the said Lackawanna Railroad Company was a common carrier subject to the provisions of an Act of Congress entitled "An Act to Regulate Commerce," approved February fourth, in the year of our Lord one thousand eight hundred and eighty-seven, and of the acts amendatory thereof and supplemental thereto, and was engaged in the transportation over the said line and route of many different kinds of freight and property in interstate commerce.

That at all the times herein mentioned the said Lackawanna Railroad Company had established and had filed with the Interstate Commerce Commission, and had published, as required by law, a tariff of rates, fares and charges for the transportation of property in interstate commerce which was in force at such times upon the said continuous line and route from the said city of New York to the said city of Buffalo, and the said tariff so as aforesaid established, filed and published by the said Lackawanna Railroad Company plainly stated the places upon its railroad and connecting lines between which property would be carried, and contained the classification of freight at said times in force.

That at all times herein mentioned the rate set forth in the said tariff so established, filed and published as aforesaid from the said city of New York to the said city of Buffalo, over the said continuous line and route, upon property of the character, kind and class herein referred to, to wit, the sugars herein mentioned, was sixteen cents for each one hundred pounds thereof.

That at all the times mentioned The American Sugar Refining Company was a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and The American Sugar Refining Company of New York was a corporation organized and existing under and by virtue of the laws of the State of New York, and the said sugar refining companies were engaged in selling and shipping under a common management large quantities of sugars over the lines of various common carriers leading out of the city of New York and State of New York, to the city of Buffalo above mentioned.

That at all said times one Lowell M. Palmer was the duly authorized agent of the said sugar refining companies and was vested by them with the sole and exclusive power and authority to determine over which of said lines of the common carriers aforesaid any of the shipments of sugar of said sugar-

refining companies should be made, and to determine whether any such carrier should receive any of such shipments.

That during the month of January, in the year of our Lord one thousand nine hundred and two, the exact date being to the jurors unknown, the said Lackawanna Railroad Company, being dissatisfied with the amount of the shipments of sugar aforesaid which it was receiving from the said sugar refining companies for transportation over its said line and route to the said city of Buffalo, and for the purpose of obtaining an increase in the amount of such shipments, by its officers and agents, acting for it and within the scope of their employment as such agents, entered into an unlawful agreement and arrangement with the said Lowell M. Palmer, whereby it was agreed that the said Palmer as agent as aforesaid, should cause and procure the said sugar refining companies to ship, over the line and route aforesaid from the said city of New York to the said city of Buffalo, large amounts of said sugars, being much larger amounts than had theretofore been shipped over the said line, and that the said sugar refining companies should pay to the said Lackawanna Railroad Company, common carrier as aforesaid, the lawful rates and charges named in said tariff, that is to say, sixteen cents for each one hundred pounds of said sugars so shipped and transported, and that the said Lackawanna Railroad Company should transport, and cause to be transported, the said sugars over the said continuous line and route, from the said city of New York to the said city of Buffalo, and that thereafter the said Palmer upon all such shipments and transportations of such sugars should present claims to and upon the said Lackawanna Railroad Company for a rebate and concession of one cent on each one hundred pounds of said sugars so shipped and transported, such claims to be in the guise of claims for "extra lighterage;" and that thereupon the said claims should be paid by the said Lackawanna Railroad Company, and the said Lackawanna Railroad Company should thereby grant and give a rebate and concession in respect of the transportation of said sugars as aforesaid to the said Palmer of one cent for each one hundred pounds of the sugars so shipped and transported, the said sum in such cases to be refunded from the lawful amount paid as aforesaid, thereby reducing the said lawful tariff of sixteen cents for each one hundred pounds of such sugars so transported in and by the amount of one cent for each one hundred pounds thereof, and thereby causing the said sugars by such device to be transported at a less rate than that named in the tariffs published and filed by the said carrier as aforesaid.

That under the said unlawful agreement and arrangement, during the month of July, in the year of our Lord one thousand nine hundred and three (the exact dates being to the jurors unknown), the said Lowell M. Palmer caused and procured the said sugar refining companies to deliver to the said Lackawanna Railroad Company, at the said city of New York, for shipment and transportation over its continuous line and route aforesaid to the said city of Buffalo, one million three thousand four hundred and eighteen pounds of

sugar, and suc\_ sugar was transported thereon and thereby to the said city of Buffalo by way of the said continuous line and route, by way of the Southern District of New York.

And the lawful rate of sixteen cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid, according and pursuant to the said agreement, to the said Lackawanna Railroad Company, and thereafter, and pursuant to said agreement, a claim of one hundred dollars and thirty-four cents, in the guise of a claim for "extra lighterage" for rebate and concession in respect of the said sugars so transported as aforesaid, was presented by the said Lowell M. Palmer to the said Lackawanna Railroad Company for payment.

That under the said unlawful agreement and arrangement, and upon the claims made as aforesaid, the said Delaware, Lackawanna & Western Railroad Company, thereafter, on the second day of October, in the year of our Lord one thousand nine hundred and three, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, out of the lawful tariff rate paid for the transportation of the said sugars as aforesaid, by way of rebate and concession in respect of the transportation of the said sugars, the sum of one hundred dollars and thirty-four cents, for and on account of such sugars so shipped and transported as aforesaid over said continuous line and route, from the said city of New York to the said city of Buffalo.

That the said claim for "extra lighterage" and the payment thereof as aforesaid was a mere device agreed upon by the parties thereto to conceal the payment of such rebate and concession, and that no services in the nature of lighterage or extra lighterage were at any time performed by the said Lowell M. Palmer or the said sugar refining companies in respect of the transportation of the said sugars, nor were any services or labor performed in respect of the said transportation except by the said Lackawanna Railroad Company, its agents and servants.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Delaware, Lackawanna and Western Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the said Southern District of New York, and within the jurisdiction of this court, on the second day of October, in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property, to wit, said sugars, in interstate commerce by a common carrier subject to said "Act to Regulate Commerce" and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariff aforesaid published and filed by such carrier as required by said "Act to Regulate Commerce" and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity and contrary

to the form of the statute of the United States in such case made and provided.

#### Second Count.

And the jurors aforesaid, on their oath aforesaid, do further present, that at the times herein mentioned the Delaware, Lackawanna & Western Railroad Company (hereinafter called the Lackawanna Railroad Company) was, and still is, a railroad corporation, duly organized under and existing by virtue of the laws of the State of Pennsylvania, and engaged in the transportation of passengers, freight and property for hire over various continuous lines and routes, all originating in the city of New York, in the State of New York, and continuing by way of the Southern District of New York to various termini in other States, as follows, viz.. to Grand Rapids, in the State of Michigan; Bay City, in the State of Michigan; Ishpeming, in the State of Michigan gan; Green Bay, in the State of Wisconsin; Manitowoc, in the State of Wisconsin, Menominee, in the State of Michigan; Dixon, in the State of Illinois; Monroe, in the State of Wisconsin; Carpentersville, in the State of Illinois; Elgin, in the State of Illinois; Algonquin, in the State of Illinois; South Bend, in the State of Indiana; Logansport, in the State of Indiana; Lafayette, in the State of Indiana; Bellefontaine, in the State of Ohio; Huntington, in the State of Indiana; Escanaba, in the State of Michigan; Port Huron, in the State of Michigan; Cleveland, in the State of Ohio; Gladstone, in the State of Michigan; Fort Wayne, in the State of Indiana; Mount Vernon, in the State of Illinois; Marion, in the State of Ohio; De Pere, in the State of Wisconsin; Marquette, in the State of Michigan; Belvidere, in the State of Illinois; Chicago, in the State of Illinois; Detroit, in the State of Michigan; Genoa Junction, in the State of Wisconsin, on and by its own railroads and lighters and the railroads and vessels of connecting common carriers, under a common control, management and arrangement for a continuous carriage and shipment, and at all such times the said Delaware, Lackawanna & Western Railroad Company was a common carrier subject to the provisions of an act of Congress entitled "An Act to Regulate Commerce," approved February fourth, in the year of our Lord one thousand eight hundred and eighty-seven, and of the acts amendatory thereof and supplemental thereto, and was engaged in the transportation over the said continuous lines and routes of many different kinds of freight and property in interstate commerce.

That at all the times herein mentioned the said Lackawanna Railroad Company and the said connecting common carriers had jointly published and had filed with the Interstate Commerce Commission, as required by law, and had published, as directed by the Interstate Commerce Commission, as provided by law, joint tariffs of the rates, fares and charges for the transportation of property in interstate commerce, which were in force at all such times upon each of the said continuous lines and routes from the said city of New York to the various termini above mentioned.

That at all the times herein mentioned The American Sugar Refining Company was a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and The American Sugar Refining Company of New York was a corporation organized and existing under and by virtue of the laws of the State of New York, and the said sugar refining companies were engaged in selling and shipping, under a common management, large quantities of sugars over the lines of various common carriers leading out of the city of New York and State of New York, to the termini above mentioned.

That at all said times one Lowell M. Palmer was the duly authorized agent of the said sugar refining companies, and was vested by them with the sole and exclusive power and authority to determine over which of said lines of the common carriers aforesaid leading out of said city of New York, any of the shipments of sugar of said sugar refining companies should be made, and to determine whether any such carrier should receive any of such shipments.

That during the month of January, in the year of our Lord one thousand nine hundred and two (the exact date being to the jurors unknown), the said Lackawanna Railroad Company, being dissatisfied with the amount of the shipments of sugar aforesaid which it was receiving from the said sugar refining companies for transportation over its said continuous lines and routes to the termini above mentioned, and for the purpose of obtaining an increase in the amount of such shipments, by its officers and agents, acting for it and within the scope of their employment as such agents, entered into an unlawful agreement and arrangement with the said Lowell M. Palmer, whereby it was agreed that the said Palmer should cause and procure the said sugar refining companies to ship, over the continuous lines and routes aforesaid established by the said Lackawanna Railroad Company and its said connecting carriers, from the said city of New York, to the various termini aforesaid, large amounts of said sugars, being much larger amounts than had theretofore been shipped over the said continuous lines and routes, and that the said sugar refining companies should pay to the said Lackawanna Railroad Company, common carrier as aforesaid, the lawful rates and charges named in said joint tariffs, that is to say, the amount named in the respective joint tariffs applicable to the route over which each shipment should be made respectively, for each one hundred pounds of such shipment so shipped and transported, and that the said Lackawanna Railroad Company should transport, and cause to be transported, each shipment over the respective line and route to the respective terminus to which it was so consigned respectively, and that thereafter the said Palmer, upon all such shipments and transportations of such sugars, should present claims to and upon the said Lackawanna Railroad Company for a rebate and concession of two cents on each one hundred pounds of said sugars so shipped and transported. such claims to be in the guise of claims for "extra lighterage;" and that thereupon the said claims should be paid by the said Lackawanna Railroad Company, and the said Lackawanna Railroad Company should thereby grant

and give a rebate and concession, in respect of the transportation of said sugars as aforesaid, to the said Palmer, of two cents for each one hundred pounds of the sugars so shipped and transported, the said sum in such cases to be refunded from the lawful amount paid for the respective shipment as aforesaid, thereby reducing the said lawful tariffs in and by the amount of two cents for each one hundred pounds thereof, and thereby causing the said sugars by such device to be transported at a less rate than that named in the joint tariffs published and filed by the said common carrier and its connecting lines as aforesaid.

That under the said unlawful agreement and arrangement the said Lowell M. Palmer caused and procured the said sugar refining companies on the respective dates enumerated below, during the month of July, in the year of our Lord one thousand nine hundred and three, to deliver to the said Lackawanna Railroad Company, for shipment and transportation over certain of the continuous lines and routes aforesaid to the respective termini of such routes as aforesaid, divers and various consignments of sugars, and the same were transported thereon and thereby to the said termini respectively, by way of the said respective lines and routes, by way of the Southern District of New York, the said dates of shipments, the numbers of the waybills and the number of pounds of sugar so shipped and transported, the respective termini or destinations to which such sugars were shipped and transported and the respective rates per one hundred pounds under the said lawful tariffs applicable in each case, being respectively as follows:

Date of No. of No. of Lbs. of Lawful Waybill. Sugar Shipped. Destination. Shipment Tariff Rate. (The matter inserted in these columns in the indictment is here omitted.) And the lawful rate for each one hundred pounds of such shipments according to the joint tariff applicable thereto as aforesaid was duly paid according and pursuant to said agreement to the said Lackawanna Railroad Company, and thereafter and pursuant to said agreement, a claim of four hundred and sixty-three dollars and fourteen cents, for rebate and concession in respect of the said sugars so transported as aforesaid, was presented by the said Lowell M. Palmer to the said Lackawanna Railroad Company for payment.

That under the said unlawful agreement and arrangement, and upon the claim made as aforesaid, the said Delaware, Lackawanna & Western Railroad Company, thereafter and on the second day of October, in the year of our Lord one thousand nine hundred and three, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer by way of rebate and concession in respect of the transportation of the said sugars, the sum of four hundred and sixty-three dollars and fourteen cents, for and on account of such sugars actually so shipped and transported as aforesaid over said continuous lines and routes from the said city of New York to the various termini above enumerated.

That the said claim for "extra lighterage" and the payment thereof as aforesaid was a mere device agreed upon by the parties thereto to conceal the payment of such rebate and concession, and that no services in the nature of lighterage or extra lighterage were at any time performed by the said Lowell M. Palmer or the said sugar refining companies in respect of the transportation of the said sugars aforesaid, nor were any services or labor performed in respect of the said transportation except by the said Lackawanna Railroad Company, its agents and servants.

And so the jurors aforesaid, on their oaths aforesaid, do say that the said Delaware, Lackawanna and Western Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the said Southern District of New York, and within the jurisdiction of this court, on the said second day of October, in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said Act to Regulate Commerce, and the acts amendatory and supplemental thereto, whereby said property was transported by such corporation and common carrier as aforesaid, at less rates than those named in the joint tariffs aforesaid, published and filed by such carrier, as required by said Act to Regulate Commerce, and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the form of the statutes of the United States in such case made and provided.

#### Third Count.

And the jurors aforesaid, on their oaths aforesaid (in this count repeating, incorporating, adopting and reaffirming the averments and allegations of the first count of this indictment, to wit, from the beginning thereof up to and including the words "and thereby causing the said sugars by such device to be transported at a less rate than that named in the tariffs published and filed by the said carrier as aforesaid") do further present and allege, that under the said unlawful agreement and arrangement, during the month of March, in the year of our Lord one thousand nine hundred and four (the exact dates being to the jurors unknown), the said Lowell M. Palmer caused and procured the said sugar refining companies to deliver to the said Lackawanna Railroad Company, at the said city of New York, for shipment and transportation over its continuous line and route aforesaid to the said city of Buffalo, five hundred and thirty-two thousand three hundred and twenty-eight pounds of sugar, and such sugar was transported thereon and thereby to the said city of Buffalo by way of the said continuous line and route, by way of the Southern District of New York.

And the lawful rate of sixteen cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid, according and pursuant to the said agreement, to the said Lackawanna Railroad Company, and thereafter, and pursuant to said agreement, a claim of fifty-three dollars and

twenty-three cents, in the guise of a claim for "extra lighterage" for rebate and concession in respect of the said sugars so transported as aforesaid, was presented by the said Lowell M. Palmer to the said Lackawanna Railroad Company for payment.

That under the said unlawful agreement and arrangement, and upon the claims made as aforesaid, the said Delaware, Lackawanna & Western Railroad Company, thereafter, on the twenty-fifth day of May in the year of our Lord one thousand nine hundred and four, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, out of the lawful tariff rate paid for the transportation of the said sugars as aforesaid, by way of rebate and concession in respect to the transportation of the said sugars, the sum of fifty-three dollars and twenty-three cents, for and on account of such sugars so shipped and transported as aforesaid over said continuous line and route, from the said city of New York to the said city of Buffalo.

That the said claim for "extra lighterage" and the payment thereof as aforesaid was a mere device agreed upon by the parties thereto to conceal the payment of such rebate and concession, and that no services in the nature of lighterage or extra lighterage were at any time performed by the said Lowell M. Palmer or the said sugar refining companies in respect of the transportation of the said sugars, nor were any services or labor performed in respect of the said transportation except by the said Lackawanna Railroad Company, its agents and servants.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Delaware, Lackawanna and Western Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the said Southern District of New York, and within the jurisdiction of this court, on the said twenty-fifth day of May in the year of our Lord one thousand nine hundred and four, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property, to wit, said sugars, in interstate commerce by a common carrier subject to said "Act to Regulate Commerce" and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariff aforesaid, published and filed by such carrier as required by said "Act to Regulate Commerce" and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided.

### Fourth Count.

And the jurors aforesaid, on their oaths aforesaid (in this count repeating, incorporating, adopting and reaffirming the averments and allegations of the second count of this indictment, to wit, from the beginning thereof up to and including the following words of the said second count, namely: "And thereby causing the said sugars by said device to be transported at a less rate than

that named in the joint tariffs published and filed by the said common carrier and its connecting lines as aforesaid"), do further present and allege, that under the said unlawful agreement and arrangement so as aforesaid mentioned and set forth in the second count hereof, the said Lowell M. Palmer, caused and procured the said sugar refining companies, on the respective dates enumerated below, during the month of March, in the year of our Lord one thousand nine hundred and four, to deliver to the said Lackawanna Railroad Company, for shipment and transportation over certain of the continuous lines and routes aforesaid to the respective termini of such routes as aforesaid, divers and various consignments of sugars, and the same were transported thereon and thereby to the said termini respectively, by way of the said respective lines and routes, by way of the Southern District of New York, the said dates of shipments, the numbers of the waybills and the number of pounds of sugar so shipped and transported, the respective termini or destinations to which such sugars were shipped and transported and the respective rates per one hundred pounds under the said lawful tariffs applicable in each case, being respectively as follows:

Date of No. of No. of Lbs. of Lawful Waybill. Sugar Shipped. Destination. Tariff Rate. (The matter inserted in these columns in this indictment is here omitted.) And the lawful rate for each one hundred pounds of such shipments according to the joint tariff applicable thereto as aforesaid was duly paid according and pursuant to said agreement to the said Lackawanna Railroad Company, and thereafter and pursuant to said agreement, a claim of one hundred and seventy-seven dollars and seventy-four cents, for rebate and concession in respect of the said sugars so transported as aforesaid, was presented by the said Lowell M. Palmer to the said Lackawanna Railroad Company for payment,

That under the said unlawful agreement and arrangement, and upon the claim made as aforesaid, the said Delaware, Lackawanna & Western Railroad Company, thereafter and on the twenty-fifth day of May in the year of our Lord one thousand nine hundred and four, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer by way of rebate and concession in respect of the transportation of the said sugars, the sum of one hundred and seventy-seven dollars and seventy-four cents, for and on account of such sugars actually so shipped and transported as aforesaid over said continuous lines and routes from the said city of New York to the various termini above enumerated.

That the said claim for "extra lighterage" and the payment thereof as aforesaid was a mere device agreed upon by the parties thereto to conceal the payment of such rebate and concession, and that no services in the nature of lighterage or extra lighterage were at any time performed by the said Lowell M. Palmer or the said sugar refining companies in respect of the

transportation of the said sugars aforesaid, nor were any services or labor performed in respect of the said transportation except by the said Lackawanna Railroad Company, its agents and servants.

And so the jurors aforesaid, on their oaths aforesaid, do say that the said Delaware, Lackawanna & Western Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the said Southern District of New York, and within the jurisdiction of this court, on the said twenty-fifth day of May in the year of our Lord one thousand nine hundred and four, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said Act to Regulate Commerce, and the acts amendatory and supplemental thereto, whereby said property was transported by such corporation and common carrier as aforesaid, at less rates than those named in the joint tariffs aforesaid, published and filed by such carrier, as required by said Act to Regulate Commerce, and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the form of the statutes of the United States in such case made and provided.

Fifth Count.

And the jurors aforesaid, on their oaths aforesaid (in this count repeating, incorporating, adopting and reaffirming the averments and allegations of the first count of this indictment, to wit, from the beginning thereof up to and including the words "and thereby causing the said sugars by such device to be transported at a less rate than that named in the tariffs published and filed by the said carrier as aforesaid"), do further present and allege, that under the said unlawful agreement and arrangement, during the month of July, in the year of our Lord one thousand nine hundred and four (the exact dates being to the jurors unknown), the said Lowell M. Palmer caused and procured the said sugar refining companies to deliver to the said Lackawanna Railroad Company, at the said city of New York, for shipment and transportation over its continuous line and route aforesaid to the said city of Buffalo, four hundred and twenty-five thousand six hundred and forty-four pounds of sugar, and such sugar was transported thereon and thereby to the said city of Buffalo by way of the said continuous line and route, by way of the Southern District of New York.

And the lawful rate of sixteen cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid, according and pursuant to the said agreement, to the said Lackawanna Railroad Company, and thereafter, and pursuant to said agreement, a claim of forty-two dollars and fifty-six cents, in the guise of a claim for "extra lighterage" for rebate and concession in respect of the said sugars so transported as aforesaid, was presented by the said Lowell M. Palmer to the said Lackawanna Railroad Company for payment.

That under the said unlawful agreement and arrangement, and upon the

claims made as aforesaid, the said Delaware, Lackawanna & Western Railroad Company, thereafter, on the twenty-eighth day of September, in the year of our Lord one thousand nine hundred and four, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, out of the lawful tariff rate paid for the transportation of the said sugars as aforesaid, by way of rebate and concession in respect to the transportation of the said sugars, the sum of forty-two dollars and fifty-six cents, for and on account of such sugars so shipped and transported as aforesaid over said continuous line and route, from the said city of New York to the said city of Buffalo.

That the said claim for "extra lighterage" and the payment thereof as aforesaid was a mere device agreed upon by the parties thereto to conceal the payment of such rebate and concession, and that no services in the nature of lighterage or extra lighterage were at any time performed by the said Lowell M. Palmer or the said sugar refining companies in respect of the transportation of the said sugars, nor were any services or labor performed in respect of the said transportation except by the said Lackawanna Railroad Company, its agents and servants.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Delaware, Lackawanna & Western Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the said Southern District of New York, and within the jurisdiction of this court, on the twenty-eighth day of September, in the year of our Lord one thousand nine hundred and four, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property, to wit, said sugars, in interstate commerce by a common carrier subject to said "Act to Regulate Commerce" and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariff aforesaid, published and filed by such carrier as required by said "Act to Regulate Commerce" and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the form of the statute of the United Staes in such case made and provided.

#### Sixth Count.

And the jurors aforesaid, on their oaths aforesaid (in this count repeating, incorporating, adopting and reaffirming the averments and allegations of the second count of this indictment, to wit, from the beginning thereof up to and including the following words of the said second count, namely: "And thereby causing the said sugars by said device to be transported at a less rate than that named in the joint tariffs published and filed by the said common carrier and its connecting lines as aforesaid") do further present and allege, that under the said unlawful agreement and arrangement so as aforesaid mentioned and set forth in the second count hereof, the said Lowell M. Palmer-

caused and procured the said sugar refining companies, on the respective dates enumerated below, during the month of July in the year of our Lord one thousand nine hundred and four, to deliver to the said Lackawanna Railroad Company, for shipment and transportation over certain of the continuous lines and routes aforesaid to the respective termini of such routes as aforesaid, divers and various consignments of sugars, and the same were transported thereon and thereby to the said termini respectively, by way of the said respective lines and routes, by way of the Southern District of New York, the said dates of shipments, the numbers of the waybills and the number of pounds of sugar so shipped and transported, the respective termini or destinations to which such sugars were shipped and transported and the respective rates per one hundred pounds under the said lawful tariffs applicable in each case, being respectively as follows:

Date of No. of No. of Lbs. of Lawful
Shipment Waybill. Sugar Shipped. Destination. Tariff Rate.
(The matter inserted in these columns in this indictment is here omitted.)

And the lawful rate for each one hundred pounds of such shipments according to the joint tariff applicable thereto as aforesaid was duly paid according and pursuant to said agreement to the said Lackawanna Railroad Company, and thereafter and pursuant to said agreement, a claim of two hundred and twenty-eight dollars and twenty-eight cents, for rebate and concession in respect of the said sugars so transported as aforesaid, was presented by the said Lowell M. Palmer to the said Lackawanna Railroad Company for payment.

That under the sail unlawful agreement and arrangement, and upon the claim made as aforesaid, the said Delaware, Lackawanna & Western Railroad Company, thereafter and on the twenty-eighth day of September, in the year of our Lord one thousand nine hundred and four, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer by way of rebate and concession in respect of the transportation of the said sugars, the sum of two hundred and twenty-eight dollars and twenty-eight cents, for and on account of such sugars actually so shipped and transported as aforesaid over said continuous lines and routes from the said city of New York to the various termini above enumerated.

That the said claim for "extra lighterage" and the payment thereof as aforesaid was a mere device agreed upon by the parties thereto to conceal the payment of such rebate and concession, and that no services in the nature of lighterage or extra lighterage were at any time performed by the said Lowell M. Palmer or the said sugar refining companies in respect of the transportation of the said sugars aforesail, nor were any services or labor performed in respect of the said transportation except by the said Lackawanna Railroad Company, its agents and servants.

And so the jurors aforesaid, on their oaths aforesaid, so say that the said Delaware, Lackawanna & Western Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the said Southern District of New York, and within the jurisdiction of this court, on the said twenty-eighth day of September, in the year of our Lord one thousand nine hundred and four, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said Act to Regulate Commerce, and the acts amendatory and supplemental thereto, whereby said property was transported by such corporation and common carrier as aforesaid, at less rates than those named in the joint tariffs aforesaid, published and filed by such carrier, as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the form of the statutes of the United States in such cases made and provided.

#### Seventh Count.

And the jurors aforesaid, on their oaths aforesaid (in this count repeating. incorporating, adopting and reaffirming the averments and allegations of the first count of this indictment, to wit, from the beginning thereof up to and including the words "and thereby causing the said sugars by such device to be transported at a less rate than that named in the tariffs published and filed by the said carrier as aforesaid"), do further present and allege, that under the said unlawful agreement and arrangement, during the month of September in the year of our Lord one thousand nine hundred and four (the exact dates being to the jurors unknown), the said Lowell M. Palmer caused and procured the said sugar refining companies to deliver to the said Lackawanna Railroad Company, at the said city of New York, for shipment and transportation over its continuous line and route aforesaid to the said city of Buffalo four hundred and eighty-seven thousand two hundred and ninety-five pounds of sugar, and such sugar was transported thereon and thereby to the said city of Buffalo by way of the said continuous line and route, by way of the Southern District of New York.

And the lawful rate of sixteen cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid, according and pursuant to the said agreement, to the said Lackawanna Railroad Company, and thereafter, and pursuant to said agreement, a claim of forty-eight dollars and seventy-three cents, in the guise of a claim for "extra lighterage" for rebate and concession in respect of the said sugars so transported as aforesaid, was presented by the said Lowell M. Palmer to the said Lackawanna Railroad Company for payment.

That under the said unlawful agreement and arrangement, and upon the claims made as aforesaid, the said Delaware, Lackawanna & Western Railroad Company, thereafter on the nineteenth day of January, in the year of our

Lord one thousand nine hundred and five, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, out of the lawful tariff rate paid for the transportation of the said sugars as aforesaid, by way of rebate and concession in respect to the transportation of the said sugars, the sum of forty-eight dollars and seventy-three cents, for and on account of such sugars so shipped and transported as aforesaid over said continuous line and route, from the said city of New York to the said city of Buffalo.

That the said claim for "extra lighterage" and the payment thereof as aforesaid was a mere device agreed upon by the parties thereto to conceal the payment of such rebate and concession, and that no services in the nature of lighterage or extra lighterage were at any time performed by the said Lowell M. Palmer or the said sugar refining companies in respect of the transportation of the said sugars, nor were any services or labor performed in respect of the said transportation except by the said Lackawanna Railroad Company, its agents and servants.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Delaware, Lackawanna & Western Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the said Southern District of New York, and within the jurisdiction of this court, on the nineteenth day of January in the year of our Lord one thousand nine hundred and five, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property, to wit, said sugars, in interstate commerce by a common carrier subject to said "Act to Regulate Commerce" and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariff aforesaid, published and filed by such common carrier as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided.

### Eighth Count.

And the jurors aforesaid, on their oaths aforesaid (in this count repeating, incorporating, adopting and reaffirming the averments and allegations of the second count of this indictment, to wit, from the beginning thereof up to and including the following words of the said second count, namely: "and thereby causing the said sugars by said device to be transported at a less rate than that named in the joint tariffs published and filed by the said common carrier and its connecting lines as aforesaid") do further present and allege, that under the said unlawful agreement and arrangement so as aforesaid mentioned and set forth in the second count hereof, the said Lowell M. Palmer caused and procured the said sugar refining companies, on the respective dates enumerated below, during the month of September in the year of our Lord

one thousand nine hundred and four, to deliver to the said Lackawanna Railroad Company, for shipment and transportation over certain of the continuous lines and routes aforesaid to the respective termini of such routes as aforesaid, divers and various consignments of sugars, and the same were transported thereon and thereby to the said termini respectively, by way of the said respective lines and routes, by way of the Southern District of New York, the said dates of shipments, the numbers of the waybills and the number of pounds of sugar so shipped and transported, the respective termini or destinations to which such sugars were shipped and transported and the respective rates per one hundred pounds under the said lawful tariffs applicable in each case, being respectively as follows:

Date of No. of No. of Lbs. of Lawful
Shipment Waybill. Sugar Shipped. Destination. Tariff Rate.
(The matter inserted in these columns in this indictment is here omitted.)

And the lawful rate for each one hundred pounds of such shipments according to the joint tariff applicable thereto as aforesaid was duly paid according and pursuant to said agreement to the said Lackawanna Railroad Company, and thereafter and pursuant to said agreement, a claim of one hundred and four dollars and fifty-seven cents, for rebate and concession in respect of the said sugars so transported as aforesaid, was presented by the said Lowell M. Palmer to the said Lackawanna Railroad Company for payment.

That under the said unlawful agreement and arrangement, and upon the claim made as aforesaid, the said Delaware, Lackawanna & Western Railroad Company, thereafter and on the nineteenth day of January, in the year of our Lord one thousand nine hundred and five, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer by way of rebate and concession in respect of the transportation of the said sugars, the sum of one hundred and four dollars and fifty-seven cents, for and on account of such sugars actually so shipped and transported as aforesaid over said continuous lines and routes from the said city of New York to the various termini above enumerated.

That the said claim for "extra lighterage" and the payment thereof as aforesaid was a mere device agreed upon by the parties thereto to conceal the payment of such rebate and concession, and that no services in the nature of lighterage or extra lighterage were at any time performed by the said Lowell M. Palmer or the said sugar refining companies in respect of the transportation of the said sugars aforesaid, nor were any services or labor performed in respect of the said transportation except by the said Lackawanna Railroad Company, its agents and servants.

And so the jurors aforesaid, on their oaths aforesaid, do say that the said Delaware, Lackawanna & Western Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid,

at and in the said Southern District of New York, and within the jurisdiction of this court, on the said nineteenth day of January, in the year of our Lord one thousand nine hundred and five, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said Act to Regulate Commerce, and the acts amendatory and supplemental thereto, whereby said property was transported by such corporation and common carrier as aforesaid, at less rates than those named in the joint tariffs aforesaid, published and filed by such carrier, as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the form of the statutes of the United States in such case made and provided.

#### Ninth Count.

And the jurors aforesaid, on their oaths aforesaid (in this count repeating, incorporating, adopting and reaffirming the averments and allegations of the first count of this indictment, to wit, from the beginning thereof up to and including the words "and thereby causing the said sugars by such device to be transported at a less rate than that named in the tariffs published and filed by the said carrier as aforesaid"), do further present and allege, that under the said unlawful agreement and arrangement, during the month of November, in the year of our Lord one thousand nine hundred and four (the exact dates being to the jurors unknown), the said Lowell M. Palmer caused and procured the said sugar refining companies to deliver to the said Lackawanna Railroad Company, at the said city of New York, for shipment and transportation over its continuous line and route aforesaid to the said city of Buffalo, one hundred and sixty-one thousand six hundred and fifty-six pounds of sugar, and such sugar was transported thereon and thereby to the said city of Buffalo by way of the said continuous line and route, by way of the Southern District of New York.

And the lawful rate of sixteen cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid, according and pursuant to the said agreement, to the said Lackawanna Railroad Company, and thereafter, and pursuant to said agreement, a claim of sixteen dollars and sixteen cents, in the guise of a claim for "extra lighterage" for rebate and concession in respect of the said sugars so transported as aforesaid was presented by the said Lowell M. Palmer to the said Lackawanna Railroad Company for payment.

That under the said unlawful agreement and arrangement, and upon the claim made as aforesaid, the said Delaware, Lackawanna & Western Rilroad Company, thereafter, on the twenty-first day of February, in the year of our Lord one thousand nine hundred and five, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, out of the lawful tariff rate paid for the trans-

portation of the said sugars as aforesaid, by way of rebate and concession in respect to the transportation of the said sugars, the sum of sixteen dollars and sixteen cents, for and on account of such sugars so shipped and transported as aforesaid over said continuous line and route, from the said city of New York to the said city of Buffalo.

That the said claim for "extra lighterage" and the payment thereof as aforesaid was a mere device agreed upon by the parties thereto to conceal the payment of such rebate and concession, and that no services in the nature of lighterage or extra lighterage were at any time performed by the said Lowell M. Palmer or the said sugar refining companies in respect of the transportation of the said sugars, nor were any services or labor performed in respect of the said transportation except by the said Lackawanna Railroad Company, its agents and servants.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Delaware, Lackawanna & Western Railroad Company, corporation and common carrier as aforesaid, at and in the said Southern District of New York, and within the jurisdiction of this court, on the twenty-first day of February, in the year of our Lord one thousand nine hundred and five, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property, to wit, said sugars, in interstate commerce by a common carrier subject to said Act to Regulate Commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariff aforesaid, published and filed by such carrier as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided.

#### Tenth Count.

And the jurors aforesaid, on their oaths aforesaid (in this count repeating, incorporating, adopting and reaffirming the averments and allegations of the second count of this indictment, to wit, from the beginning thereof up to and including the following words of the said second count, namely: "and thereby causing the said sugars by said device to be transported at a less rate than that named in the joint tariffs published and filed by the said common carrier and its connecting lines as aforesaid"), do further present and allege, that under the said unlawful agreement and arrangement so as aforesaid mentioned and set forth in the second count hereof, the said Lowell M. Palmer caused and procured the said sugar refining companies, on the respective dates enumerated below, during the month of November, in the year of our Lord one thousand nine hundred and four, to deliver to the said Lackawanna Railroad Company, for shipment and transportation over certain of the continuous lines and routes aforesaid, divers and various consignments of sugars, and the same were transported thereon and thereby to the said termini re-

spectively, by way of the said respective lines and routes, by way of the Southern District of New York, the said dates of shipments, the numbers of the waybills and the number of pounds of sugar so shipped and transported, the respective termini or destinations to which such sugars were shipped and transported and the respective rates per one hundred pounds under the said lawful tariffs applicable in each case, being respectively as follows:

Date of No. of No. of Lbs. of Lawful
Shipment Waybill. Sugar Shipped. Destination. Tariff Rate.
(The matter inserted in these columns in this indictment is here omitted.)

And the lawful rate for each one hundred pounds of such shipments according to the joint tariff applicable thereto as aforesaid was duly paid according and pursuant to said agreement to the said Lackawanna Railroad Company, and thereafter and pursuant to said agreement, a claim of forty-seven dollars and fifty-five cents, for rebate and concession in respect of the said sugars so transported as aforesaid, was presented by the said Lowell M. Palmer to the said Lackawanna Railroad Company for payment.

That under the said unlawful agreement and arrangement, and upon the claim made as aforesaid, the said Delaware, Lackawanna & Western Railroad Company, thereafter and on the twenty-first day of February in the year of our Lord one thousand nine hundred and five, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer by way of rebate and concession in respect of the transportation of the said sugars, the sum of forty-seven dollars and fifty-five cents, for and on account of such sugars actually so shipped and transported as aforesaid over said continuous lines and routes from the said city of New York to the various termini above enumerated.

That the said claim for "extra lighterage" and the payment thereof as aforesaid was a mere device agreed upon by the parties thereto to conceal the payment of such rebate and concession, and that no services in the nature of lighterage or extra lighterage were at any time performed by the said Lowell M. Palmer or the said sugar refining companies in respect of the transportation of the said sugars aforesaid, nor were any services or labor performed in respect of the said transportation except by the said Lackawanna Railroad Company, its agents and servants.

And so the jurors aforesaid, on their oaths aforesaid, do say that the said Delaware, Lackawanna & Western Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the said Southern District of New York, and within the jurisdiction of this court, on the said twenty-first day of February in the year of our Lord one thousand nine hundred and five, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said Act to Regulate Commerce and the acts amendatory and supplemental thereto, whereby said property was transported by such corporation and common

carrier as aforesaid, at less rates than those named in the joint tariffs aforesaid, published and filed by such carrier, as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the form of the statutes of the United States in such case made and provided.

### HENRY L. STIMSON,

United States Attorney.58

[58. This form was used in the case of United States v. Delaware, L. & W. R. Co., 152 Fed. 269, in which it was held that a payment of rebates was sufficiently charged in violation of the Elkins Act, and also holding that the indictment was not duplicitous in alleging that the defendant offered, granted and gave a rebate.]

## FORM 56.

#### Interstate Commerce-Offering, Granting and Giving a Rebate.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA For the Southern District of New York, in the Second Circuit.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the City of New York, within and for the District and Circuit aforesaid, on the third Wednesday of June, in the year of our Lord one thousand nine hundred and six, and continued by adjournment to and including the tenth day of August, in the year of our Lord one thousand nine hundred and six.

SOUTHERN DISTRICT OF NEW YORK, SS.:

The jurors of the United States of America within and for the District and Circuit aforesaid, on their oath present that at all the times hereinafter mentioned the Missouri Pacific Railway Company was, and still is, a railroad corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, and was a common carrier engaged in the transportation of passengers and property, by and over railroads operated by it, from the city of Poplar Bluff in the State of Missouri to the city of Cairo in the State of Illinois; and that at all the times hereinafter mentioned the Cleveland, Cincinnati, Chicago & St. Louis Railway Company was, and still is, a railroad corporation, duly organized and existing under and by virtue of the laws of the State of Ohio, and was a common carrier engaged in the transportation of passengers and property, by and over railroads operated by it, from the aforesaid city of Cairo to the city of Cleveland in the State of Ohio; and that at all the times hereinafter mentioned the Lake Shore & Michigan Southern Railway Company was, and still is, a railroad corporation, duly organized and existing under and by virtue of the laws of the State

of New York, and was a common carrier engaged in the transportation of passengers and property, by and over railroads operated by it, from the aforesaid city of Cleveland in the State of Ohio to the city of Buffalo in the State of New York; and that at all the times hereinafter mentioned the New York Central & Hudson River Railroad Company was, and still is, a railroad corporation, duly organized and existing under and by virtue of the laws of the State of New York, and was a common carrier engaged in the transportation of passengers and property, by and over railroads operated by it, from the aforesaid city of Buffalo in the State of New York to the city of New York in the State of New York; and that at all the times herein mentioned the said Missouri Pacific Railway Company, and the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and the said Lake Shore & Michigan Southern Railway Company, and the said New York Central & Hudson River Railroad Company, had established a continuous through line or route operated by the aforesaid common carriers over their respective lines and routes aforesaid, from the said city of Poplar Bluff in the State of Missouri, by way of the Southern District of New York, to the said city of New York in the State of New York; and at all such times the aforesaid common carriers, under a common management, arrangement and control, handled and transported freight and property for hire from the aforesaid city of Poplar Bluff to the aforesaid city of New York, by and over the aforesaid continuous line and route, and in respect to the transportation of such freight and property for hire over the aforesaid continuous line and route, under such common management, arrangement and control, were in all respects and at all such times common carriers subject to the provisions of an act of Congress entitled "An Act to Regulate Commerce," approved February fourth in the year of our Lord one thousand eight hundred and eighty-seven, and the various acts amendatory thereof and supplemental thereto.

That at all the times herein mentioned, the said Missouri Pacific Railway Company and the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the said Lake Shore & Michigan Southern Railway Company and the said New York Central & Hudson River Railroad Company, had jointly established and the said Missouri Pacific Railway Company had filed with the Interstate Commerce Commission as required by law, and had published in accordance with the directions of the Interstate Commerce Commission as provided by law, a joint tariff of rates, fares and charges for the transportation of property in interstate commerce, which said joint tariff was in force at all such times upon the aforesaid continuous line and route theretofore established by said common carriers as aforesaid, from the aforesaid city of Poplar Bluff to the aforesaid city of New York. And the said joint tariffs so as aforesaid filed and published by the said Missouri Pacific Railway Company plainly stated the places upon said respective lines and routes of the aforesaid common carriers, between which freight and property

would be carried, and contained the classification of freight at such times in force.

That at all the times herein mentioned the rate set forth in said joint tariffs so established, filed and published as aforesaid and in force, from the said city of Poplar Bluff to the said city of New York over the aforesaid continuous line and route theretofore established as aforesaid, upon property of the character, kind and class hereinafter mentioned, to wit, the barrel heads and staves commonly known as cooperage materials, hereinafter mentioned, was thirty-five cents for each one hundred pounds thereof.

That at all the times herein mentioned, one Nathan Guilford was an officer and agent of and a person acting for and employed by the said New York Central & Hudson River Railroad Company, that is to say, traffic manager of said corporation, and as such traffic manager had general charge and control of the freight department of the said corporation.

That at all the times herein mentioned, the Brooklyn Cooperage Company was a corporation duly organized and existing under and by virtue of the laws of the State of New York, and that at all the times herein mentioned one Lowell M. Palmer was an officer and agent of and a person acting for and employed by the said Brooklyn Cooperage Company, that is to say, president of said corporation, and as such president had general charge and control and management of the business of said corporation.

That at all the times herein mentioned, the said Brooklyn Cooperage Company was engaged in the cooperage business, and in such business used large quantities of barrel heads and staves of the kind and character herein mentioned, and that large quantities of such barrel heads and staves were manufactured by said Brooklyn Cooperage Company, at the aforesaid city of Poplar Bluff in the State of Missouri, and that after the same were so manufactured as aforesaid, the said Brooklyn Cooperage Company caused and procured the same to be transported for it by various common carriers over their lines leading out of the aforesaid city of Poplar Bluff, including the aforesaid continuous line and route theretofore established as aforesaid by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, from the said city of Poplar Bluff to the said city of New York.

That in the month of January in the year of our Lord one thousand eight hundred and ninety-eight (the exact date being to the jurors unknown), the aforesaid Lowell M. Palmer, who was then and there and at all the times herein mentioned acting for and on behalf of and as president and agent of, and by procurement of, the aforesaid Brooklyn Cooperage Company, and the aforesaid Nathan Guilford, who was then and there and at all the times herein mentioned, acting for and on behalf of, and by procurement of, and as traffic manager and agent as aforesaid of the New York Central & Hudson River Railroad Company, entered into an unlawful agreement and arrangement, whereby it was agreed that the said Brooklyn Cooperage Company should and would ship barrel heads and staves, commonly known as

cooperage material, over the aforesaid through line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York, and that the aforesaid common carriers should and would transport and cause to be transported such cooperage material over the aforesaid continuous line and route from the said city of Poplar Bluff to the said city of New York, and that the said Brooklyn Cooperage Company should and would pay and cause and procure to be paid to the aforesaid common carriers the lawful rates and charges named in the aforesaid tariff, that is to say, the sum of thirty-five cents for each one hundred pounds thereof so shipped and transported, and that thereafter the aforesaid New York Central & Hudson River Railroad Company should and would repay to the said Lowell M. Palmer, as agent of and acting on behalf of and for said Brooklyn Cooperage Company as aforesaid, the sum of five and four-fifths cents for each one hundred pounds of the said cooperage material so transported, in respect of such transportation of the same, and thereby reduce said lawful tariff of thirty-five cents for each one hundred pounds thereof so transported, in and by said amount, with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported.

That thereafter, and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of February in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, one carload of the aforesaid cooperage material, the same weighing thirty-seven thousand one hundred pounds, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York.

That the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter, under and pursuant to the aforesaid unlawful agreement and arrangement, and on the twenty-seventh day of August in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in

respect of the transportation of the aforesaid carload of cooperage material, the sum of twenty-one dollars and fifty-two cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said twenty-seventh day of August, in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to the said Act to Regulate Commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

Second Count.

SOUTHERN DISTRICT OF NEW YORK, SS.:

The jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath present that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter, and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of February, in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, five hundred thousand eight hundred pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the twenty-seventh day of August, in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of two hundred and ninety dollars and forty-six cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said twenty-seventh day of August, in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to the said Act to Regulate Commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

### Third Count.

SOUTHERN DISTRICT OF NEW YORK, SS.:

The jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath present that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of March, in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid

city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, one hundred and forty-six thousand one hundred pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the twenty-seventh day of August in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of eighty-four dollars and seventy-four cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said twenty-seventh day of August in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to the said Act to Regulate Commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto, against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

#### Fourth Count.

SOUTHERN DISTRICT OF NEW YORK, SS.:

The jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath present that they here repeat and herein

incorporate each, every and all the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of April, in the year of our Lord one thousand nine hundred and three (the exact dates being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, one hundred and thirty-one thousand three hundred and fifty pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the sixteenth day of September in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of seventy-six dollars and eighteen cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said sixteenth day of September, in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to the said Act

to Regulate Commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto, against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

Fifth Count.

SOUTHERN DISTRICT OF NEW YORK, SS.:

The jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of May, in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, two hundred and one thousand three hundred pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company, and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the sixteenth day of September, in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of one hundred and sixteen dollars and seventy-five cents, for and on

account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said sixteenth day of September, in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said Act to Regulate Commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said Act to Regulate Commerce, and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

Sixth Count.

SOUTHERN DISTRICT OF NEW YORK, SS .:

The jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of June, in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, two hundred and seventy-nine thousand seven hundred and fifty pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement to the aforesaid common carriers.

That thereafter and on the sixthteenth day of November, in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of one hundred and sixty-two dollars and twenty-five cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said sixteenth day of November, in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said Act to Regulate Commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

Seventh Count.

SOUTHERN DISTRICT OF NEW YORK, SS.:

The jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of July, in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid con-

tinuous through line and route to the aforesaid city of New York, sixty-one thousand pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid. was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the sixteenth day of November in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of thirty-five dollars and thirty-eight cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said sixteenth day of November in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said Act to Regulate Commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

Eighth Count.

SOUTHERN DISTRICT OF NEW YORK, SS.:

The jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

ported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of July in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, two hundred and forty-seven thousand pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the sixteenth day of December in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of one hundred and forty-three dollars and twenty-six cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said sixteenth day of December in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said Act to Regulate Commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto; against the

peace of the United States and their dignity, and contrary to the statute in such case made and provided.

Ninth Count.

SOUTHERN DISTRICT OF NEW YORK, SS ..

The jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of August in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, two hundred and twenty-one thousand three hundred pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the twenty-ninth day of January in the year of our Lord one thousand nine hundred and four, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of one hundred and twenty-eight dollars and thirty-five cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid

at and in the Southern District of New York, and within the jurisdiction of this court, on the said twenty-ninth day of January in the year of our Lord one thousand nine hundred and four, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said Act to Regulate Commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

Tenth Count.

SOUTHERN DISTRICT OF NEW YORK, SS.:

The jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of September in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, one hundred and sixty-seven thousand two hundred pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the twenty-ninth day of January in the year of our Lord one thousand nine hundred and four, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the

said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of ninety-six dollars and ninety-seven cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said twenty-ninth day of January in the year of our Lord one thousand nine hundred and four, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said Act to Regulate Commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto, against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

#### Eleventh Count.

SOUTHERN DISTRICT OF NEW YORK, SS.:

The jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of December in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, one hundred and twenty-eight thousand three hundred pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over

the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the twenty-fifth day of May in the year of our Lord one thousand nine hundred and four, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of such corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of seventy-four dollars and forty-one cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Kailroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said twenty-fifth day of May in the year of our Lord one thousand nine hundred and four, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said Act to Regulate Commerce and the acts amendatory and supplemental thereto whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said Act to Regulate Commerce and the acts amendatory and supplemental thereto, against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

#### Twelfth Count.

SOUTHERN DISTRICT OF NEW YORK, SS.:

The jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be trans-

ported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of January in the year of our Lord one thousand nine hundred and four (the exact date being to the jurors unknown), delivered and caused tod be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, one hundred and twenty-nine thousand pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the twenty-third day of September in the year of our Lord one thousand nine hundred and four, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of seventy-four dollars and eighty-two cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said twenty-third day of September in the year of our Lord one thousand nine hundred and four, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said Act to Regulate Commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said Act to Regulate

Commerce and the acts amendatory and supplemental thereto, against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

### HENRY L. STIMSON,

United States Attorney.58a

[58a. This form was used in the case of United States v. New York Cent. & H. R. R. Co., 146 Fed. 298. This indictment was demurred to on the ground that the unlawful discrimination was not sufficiently pleaded, because no other person was named who was charged a larger rate. The demurrer was overruled.]

# FORM 57.

## Intoxicating Liquors-Unlawful Sale of.

"COMMONWEALTH OF MASSACHUSETTS, HAMPSHIRE, SS..

At the court of common pleas, begun and holden at Northampton, within and for the county of Hampshire, on the second Monday of June, in the year of our Lord one thousand eight hundred and fifty-five.

"The jurors for said Commonwealth on their oath present, that Lewis B. Edwards, of Northampton, in said county, at said Northampton, on the first day of November in the year one thousand eight hundred and fifty-four, and at said Northampton, from said last mentioned day to the eighteenth day of May in the year eighteen hundred and fifty-five, without then and there having any license, appointment or authority therefor, first duly had and obtained, according to law, was then and there a common seller of intoxicating liquors, the same not being cider then and there manufactured and sold for other purposes than that of a beverage, and the same not being the fruit of the vine, then and there sold and used for the commemoration of the Lord's Supper; against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided. A true bill.

"JOHN POMEROY,

"Foreman of the Grand Jury.

"I. F. CONKEY, District Attorney."59

[59. Commonwealth v. Edwards, 4 (Gray) Mass. 1, 2. In this case it was decided that in this Commonwealth an indictment, which purports by its caption to have been found at a court of common pleas for the county of Hampshire, and in the body of which "the jurors of said Commonwealth on their oath present," sufficiently shows that it was returned by the grand jury for the county of Hampshire. And it was decided that an indictment which purports by its caption to have been found at a court of common pleas for the county of Hampshire, and charges an offense at a town named "in said county" alleges with sufficient certainty the place of the commission of the offense. It was also held that an indictment, which avers generally the defendant at a time and place named was a common seller of intoxicating liquor, is sufficient, without setting forth any particular sales, or any number of sales.]

# FORM 58.

## Intoxicating Liquors-Unlawful Sale of.

COUNTY OF DUCHESS, SS .:

The jurors of the people of the State of New York, in and for the body of the county of Duchess, upon their oaths and affirmations, present:

That Thomas Gilkinson, late of the city of Poughkeepsie, in the county of Duchess aforesaid, on the 12th day of September, 1857, at the city of Poughkeepsie, county aforesaid, sold by retail to divers citizens of this State, and to divers persons to the jurors aforesaid unknown, and did deliver, in pursuance of such sale, to the said divers citizens and the said divers persons to the jurors aforesaid unknown, strong, intoxicating and spirituous liquors and wine, to wit, one gill of brandy, one gill of rum, one gill of gin, one gill of whiskey, one gill of cordial, one gill of bitters, one gill of wine, one gill of ale, to be drank in the house, store, shop and grocery of the said Gilkinson, at the city of Poughkeepsie aforesaid, without having obtained a license therefor as a tavern keeper, or without being in any way authorized to sell the same as aforesaid, contrary to the statute in such case made and provided, and against the peace of the people of the State of New York, their laws and dignity.

And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present: That the said Thomas Gilkinson, late of the city of Poughkeepsie, in said county of Dutchess and State of New York, at the said city of Poughkeepsie, on the 1st day of August, in the year one thousand eight hundred and fifty-seven, and on divers other days and times between that day and the day of the finding of this indictment, to wit, the 1st day of July, 1857, did sell by retail to divers citizens of this State, and to divers persons to the jurors aforesaid unknown, and did then and there deliver, in pursuance of such sale to the said divers citizens, and the said divers persons to the jurors aforesaid unknown, strong and spirituous liquors and wines, to wit, one gill of brandy, one gill of rum, one gill of gin, one gill of whiskey, one gill of cordial, one gill of bitters, one gill of wine, one gill of ale, to be drank in the house, store, shop or grocery of the said Thomas Gilkinson, in the city of Poughkeepsie aforesaid, without having obtained a license therefor as a tavern keeper, and without being in any way authorized, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, their laws and dignity.

C. WHEATON.

Acting District Attorney.60

[60. People v. Gilkinson, 4 Park. Cr. R. (N. Y.) 26.]

## FORM 59.

## Intoxicating Liquors-Unlawful Sale of.

SUFFOLK COUNTY, SS.:

The jurors of the people of the State of New York, in and for the body of the county of Suffolk, upon their oath present: That Hannibal French, late of the town of Southampton, in the county of Suffolk, merchant, and Charles J. Conklin, late of the same place, merchant, on the fifteenth day of February, one thousand eight hundred and fifty-four, with force and arms, at the town and in the county aforesaid, did wilfully, unlawfully and wrongfully sell. to divers persons, strong and spirituous liquors and wines, in quantities less than five gallons at a time, to wit, one gill of rum, one gill of brandy, one gill of whiskey, one gill of gin, and one pint of wine, without having a license therefor granted, pursuant to the provisions of the statute entitled "Of excise and the regulations of taverns and groceries," in contempt of the said people and their law, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Hannibal French and Charles J. Conklin, on the fifteenth day of April, one thousand eight hundred and fifty-four, with force and arms, at the town and in the county aforesaid, did wilfully, unlawfully and wrongfully sell, to divers persons, other strong and spirituous liquors and wines, in quantities less than five gallons, at a time, without having a license therefor granted, pursuant to the provisions of the statute entitled "Of excise, and the regulation of taverns and groceries," in contempt of the said people and their laws, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Hannibal French and Charles J. Conklin, on the fifteenth day of July, one thousand eight hundred and fifty-four, at the town and in the county aforesaid, did wilfully, unlawfully and wrongfully sell, to some person to the jurors aforesaid unknown, other strong and spirituous liquors and wines, in quantities less than five gallons at a time, to wit, one gill of rum, one gill of brandy, one gill of whiskey, one gill of gin and one pint of wine, without having a license therefor granted pursuant to the provision of the statute entitled "Of excise, and the regulation of taverns and groceries," in contempt of the said people and their laws, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Hannibal French and Charles J. Conklin, on the fifteenth day of August, one thousand eight hundred and fifty-four, at the town and in the county aforesaid, did wilfully, unlawfully and wrongfully sell, to divers

persons, other strong or spirituous liquors and wines, to be drank in their house there situate, to wit, one gill of rum, one gill of brandy, one gill of whiskey, one gill of gin, and one pint of wine, and did then and there suffer such spirituous liquors and wines sold by them and under their direction and authority, to be drank in their said house, without having obtained a license therefor as a tavern keeper, in contempt of the said people and their laws, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Hannibal French and Charles J. Conklin, on the fifteenth day of September, one thousand eight hundred and fifty-four, at the town and in the county aforesaid, did wilfully, unlawfully and wrongfully sell, to divers persons, other strong and spirituous liquors and wines, to be drank in the house of them, the said Hannibal French and Charles J. Conklin, there situate, and did then and there suffer such spirituous liquors and wines, sold by them, and under their direction and authority, to be drank in their house, without having obtained a license therefor as a tavern keeper, in contempt of the said people and their laws, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

WM. WICKHAM, Jr.,

District Attorney.61

[61. French v. People, 3 Park. Cr. R. (N. Y.) 114.]

### FORM 60.

### Intoxicating Liquors-Unlawful Sale of.

STATE OF NEW YORK, LIVINGSTON COUNTY, SS.:

The jurors of the people of the State of New York, and for the body of the county of Livingston, then and there being sworn and charged to inquire for the people of the said State and for the body of the said county of Livingston, on their oath present: That Joseph Wheelock, of the town of Leicester, in the county of Livingston, on the sixteenth day of January, in the year of our Lord one thousand eight hundred and fifty-four, and at divers other times between that day and the day of the finding of this inquisition, at the town of Leicester, in the said county of Livingston, did sell to divers individuals, to wit, Harmon Parish, Hiram Willis, Norman Green, Nelson Willis and to divers other persons, strong and spirituous liquors in quantities less than five gallons, to wit, one pint of whiskey, one pint of rum, one pint of gin, one pint of brandy, one pint of wine and one pint of strong beer, to each of the above named individuals, without license therefor, contrary to the provisions of the ninth title of the twentieth chapter of the first part of the Revised Statutes of the State of New York,

and against the peace of the people of the State of New York and their dignity. And the jurors aforesaid, on their oath aforesaid, do further present: That the said Joseph Wheelock, on the sixteenth day of January, in the year of our Lord one thousand eight hundred and fifty-four, and at divers other times between that day and the finding of this inquisition, at the town of Leicester, in the said county of Livingston, did sell to certain individuals, to wit, Harmon Parish, Hiram Willis, Norman Green, Nelson Willis and to divers other persons, strong and spirituous liquors and wines, to wit, one pint of whiskey, one pint of rum, one pint of gin, one pint of brandy, one pint of wine and one pint of strong beer, to each of the above mentioned persons, to be drank in the house, and in the shop, and in a certain out-house, and in a certain yard, and in a certain garden appertaining thereto, without having obtained a license therefor as a tavern keeper, contrary to the provisions of the ninth title of the twentieth chapter of the first part of the Revised Statutes of the State of New York, and against the peace of the people of the said State and their dignity. And the jurors aforesaid, on their oath aforesaid, do further present: That the said Joseph Wheelock, on the sixteenth day of January, in the year last aforesaid, and at divers other times between that day and the day of the finding of this inquisition, at the town and in the county last aforesaid, did sell and cause to be sold to divers individuals, to wit, to Harmon Parish, Hiram Willis. Norman Green, Nelson Willis, and to divers other persons, strong and spirituous liquors and wines, to wit, one pint of whiskey, one pint of rum, one pint of gin, one pint of brandy, one pint of wine and one pint of strong beer, to each of the said persons, and did then and there suffer the said liquors and wines so sold and caused to be sold by him as aforesaid to be drank in his house, and in his shop, and in a certain out-house, and in a certain yard, and in a certain garden appertaining thereto, without having obtained any license therefor as a tavern keeper, contrary to the provisions of the ninth title of the twentieth chapter of the first part of the Revised Statutes of the State of New York and against the peace of the people of the said State and their dignity.

JAMES WOOD, JR.,

District Attorney.62

[62. People v. Wheelock, 3 Park. Cr. R. (N. Y.) 9, holding that the word "beer," in its ordinary sense, denotes a beverage which is intoxicating, and is within the fair meaning of the words "strong or spirituous liquors," used in the statutes applicable to the case.]

#### FORM 61.

#### Kidnapping.

SARATOGA COUNTY, SS.:

Be it remembered: That at a Court of General Sessions, holden at the court house in the village of Ballston Spa, in and for the county of Saratoga, on

the 28th day of August, 1854, before John A. Corey, county judge of the county of Saratoga, David Maxwell and Abram Sickler, justices of the peace for sessions, in and for said county, and James W. Horton, clerk:

It is presented upon the oaths of the jurors, of the people of the State of New York, in and for the body of the county aforesaid, good and lawful men of the county aforesaid, then and there sworn and charged to inquire for the said people for the body of the county aforesaid:

First-That Alexander Merrill and Joseph Russell, late of the town of Saratoga Springs, in the county of Saratoga aforesaid, on or about the tenth of March, in the year of our Lord one thousand eight hundred and forty-one, with force and arms, at the said town of Saratoga Springs, in the county of Saratoga aforesaid, without lawful authority, one Solomon Northup, he, the said Solomon Northup, there living a free negro and a citizen of the State of New York, and in the peace of God and the people of said State, then and there being, did unlawfully and feloniously inveigle and kidnap with intent, him, the said Samuel Northup, unlawfully and feloniously against his will and without his consent, to cause to be sold as a slave. And him, the said Solomon Northup, unlawfully and feloniously and against his will, did sell as a slave, against the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity, and the jurors aforesaid, upon their oaths aforesaid, do further present: That from the time the said Alexander Merrill and Joseph Russell, had so inveigled and kidnapped the said Solomon Northup, to wit, the tenth day of March, 1841, during and until the first day of July, 1854, they, the said Alexander Merrill and Joseph Russell, have not been the inhabitants of the State of New York.

Second-And the jurors aforesaid, upon their oaths aforesaid, do further That the said Alexander Merrill and Joseph Russell, late of the town of Saratoga Springs, in the county of Saratoga aforesaid, afterwards, to wit, on the said tenth day of March, in the year of our Lord one thousand eight hundred and forty-one, with force and arms, at the said town of Saratoga Springs, in the county of Saratoga aforesaid, without lawful authority, one Solomon Northup, he, the said Solomon Northup, then being a free negro and a citizen of the State of New York, and in the peace of God and of the people of the said State, then and there being, did unlawfully and feloniously inveigle to accompany them, the said Alexander Merrill and Joseph Russell, to the District of Columbia, with intent unlawfully and feloniously to cause the said Solomon Northup to be sold as a slave; and him, the said Solomon Northup, did then and there, without his consent, sell as a slave, to the great damage of the said Solomon Northup, against the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oaths aforesaid, do further present: That from the time the said Alexander Merrill and Joseph Russell had inveigled the said Solomon Northup, and him, the said Solomon Northup, sold as a slave aforesaid, to wit, the tenth day of March, 1841, during and

until the first day of July, 1854, they, the said Alexander Merrill and Joseph Russell, were not usually resident within the State of New York.

Third-And the jurors aforesaid, upon their oaths aforesaid, do further present: That heretofore, to wit, on the tenth day of March, in the year of our Lord one thousand eight hundred and forty-one, at the town of Saratoga Springs, in the county of Saratoga aforesaid, one Solomon Northup, who was then a free negro and an inhabitant of the State of New York, was unlawfully and feloniously and without lawful authority inveigled from this State to the city of Washington, in the District of Columbia, by the above mentioned Alexander Merrill and Joseph Russell. That the said Alexander Merrill and Joseph Russell, late of the said town of Saratoga Springs, in the said county of Saratoga, afterwards, to wit, on or about the first day of January, in the year of our Lord one thousand eight hundred and fifty-three, with force and arms, at the said city of Washington, unlawfully and feloniously sold and transferred the services and labor of the said Solomon Northup, without his consent, to some person or persons to the jurors aforesaid unknown, for a term to the jurors aforesaid unknown, to the great damage of the said Solomon Northup, and against the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

Fourth-And the jurors aforesaid, upon their oaths aforesaid, do further present: That Alexander Merrill and Joseph Russell, late of the town of Saratoga Springs, in the county of Saratoga aforesaid, afterwards, to wit, on or about the first day of January, in the year of our Lord one thousand eight hundred and fifty-three, with force and arms, at the said town of Saratoga Springs, in the county of Saratoga aforesaid, without lawful authority, one Solomon Northup, then being a free negro and an inhabitant of the State of New York, and in the peace of God and of the people of the State of New York, then and there being, did unlawfully and feloniously inveigle from the State of New York to the city of Washington, in the District of Columbia, with intent then and there to cause the said Solomon Northup to be sold as a slave. And the said Alexander Merrill and Joseph Russell, him, the said Solomon Northup, did then and there, with force and arms, unlawfully and feloniously sell as a slave to some person or persons to the jurors aforesaid unknown, to the great damage of him, the said Solomon Northup, against the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.63

[63. People v. Merrill, 2 Park. Cr. R. (N. Y.) 590. This indictment was under §§ 28 and 32, 2 R. S. 664, for the offense of kidnapping with intent to sell and for inveigling a person of color and selling him as a slave.]

### FORM 62.

#### Larceny.

COURT OF GENERAL SESSIONS OF THE PEACE OF THE CITY AND COUNTY OF NEW YORK:

The People of the State of New York against William S. Roberts and Edward H. Walton.

The grand jury of the city and county of New York by this indictment accuse William S. Roberts and Edward H. Walton of the crime of grand larceny in the first degree, committed as follows: The said William S. Roberts and Edward H. Walton, each late of the first ward of the city of New York, in the county of New York aforesaid, on the fourteenth day of February, in the year of our Lord one thousand eight hundred and eightyfour, at the ward, city and county aforesaid, with force and arms, ten written instruments and evidences of debt, to wit, the bonds and written obligations issued by the Georgetown and Lane's Railroad Company, a corporation duly existing under the laws of the State of South Carolina, and called "first mortgage bonds," in and by each of which the said railroad company acknowledged itself indebted to the bearer thereof in the sum of one thousand dollars, and which said sum the said railroad company thereby promised to pay on the first day of January, in the year of our Lord 1913, with interest, the same bearing date on the first day of January, in the year of our Lord 1883, and being then and there each duly signed by the president and secretary of the said railroad company, and sealed with the seal thereof, and numbered nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen, respectively, and being then and there in full force and effect, and wholly unsatisfied, and of the value of one thousand dollars each (a more particular description of which said bonds and written obligations is to the grand jury aforesaid unknown), of the valuable things, evidences of debt, goods, chattels and personal property of the Bethlehem Iron Company then and there being found, then and there feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

RANDOLPH B. MARTINE,

District Attorney.64

[64. Roberts v. Reilly, 116 U. S. 80, 84, 85; 6 S. C. 291.]

# FORM 63.

#### Larceny.

STATE OF INDIANA, LAGRANGE COUNTY, SS.:

STATE OF INDIANA V. GEORGE T. ULMER.

In the Lagrange Circuit Court, October Term, A. D. 1858, adjourned to January, A. D. 1859.

The grand jurors of the State of Indiana, duly impaneled, sworn and charged, in said court, at said term, to inquire within and for the body of said county of Lagrange, upon their oath present and charge that one Asa Crape and one William Jones, late of said county, on the 12th day of September, in the year of our Lord eighteen hundred and fifty-six, at and in the county of Lagrange aforesaid, two horses of the value of one hundred dollars each, and one horse, commonly called a gelding, of the value of one hundred dollars, the personal goods and chattels of one Ralph Selby, then and there being found, did unlawfully and feloniously steal, take, lead, ride and drive away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

And the said grand jurors further present and charge that George T. Ulmer, late of the county aforesaid, before the committing of the felony and larceny aforesaid, to wit, on the 10th day of September, in the year last aforesaid, at and in the county of Lagrange aforesaid, did unlawfully and feloniously incite, move, procure, encourage, counsel, hire and command the said Asa Crape and the said William Jones to do and commit the said felony and larceny in manner and form aforesaid.

And the said grand jurors do further present and charge that the said George T. Ulmer, at and from the day and year last aforesaid, did conceal the fact of said crime and offense by him committed in manner and form as aforesaid, for the period and time of one year from and after the commission thereof by him, to wit, on and from the 10th day of September, A. D. eighteen hundred and fifty-six, to the 10th day of September, eighteen hundred and fifty-seven.

And the said grand jurors do further present and charge that the said George T. Ulmer, after the commission of said offense by him committed as aforesaid, has been absent from the State of Indiana aforesaid for the period and time of five months, to wit, from the thirtieth day of January, A. D. eighteen hundred and fifty-eight, to the first day of July, A. D. eighteen hundred and fifty-eight; and that the said George T. Ulmer has concealed himself so that process could not be served upon him for the period and time of five months after the commission of said offense by him committed as aforesaid.

And so the jurors, upon their oaths aforesaid, do say and charge that the said George T. Ulmer did commit the crime aforesaid in manner and form

aforesaid, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

### ROBERT PARROTT,

Special Prosecuting Attorney.65

[65. Ulmer v. State, 14 Ind. 52, 53, holding that an indictment against an accessory before the fact must aver the commission of the offense by the principal, as well as the counseling of it by the accessory, and that this was sufficiently averred in the above indictment.]

# FORM 64.

### Larceny—Grand.

The grand jury of the county of Niagara, by this indictment, accuses Charles H. Laurence of the crime of grand larceny in the first degree, committed as follows:

That the said Charles H. Laurence, on or about the 10th day of August, in the year of our Lord one thousand eight hundred and ninety-one, at the city of Lockport, within the county of Niagara, with force and arms, with intent to deprive and defraud the Lockport Street Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, of the proper goods and chattels hereinafter mentioned, and of the use and benefit thereof, and to appropriate the same to the use and benefit of him, the said Charles H. Laurence, did then and there feloniously, falsely and fraudulently pretend and represent to the said Lockport Street Railroad Company, if the said Lockport Street Railroad Company would permit him, the said Charles H. Laurence, to ship to Buffalo two of the horse cars, numbered respectively seven (7) and eight (8) of the said Lockport Street Railroad Company, that he, the said Charles H. Laurence, would have the said two horse cars so transformed that they might be run by electricity as a motive power instead of by horse power, and return the said two cars so transformed to the barn of the said Lockport Street Railroad Company in Lockport, with all possible speed, and ready and fit to be used upon the tracks of the said Lockport Street Railroad Company before the first day of January, 1892, and the said Lockport Street Railroad Company then and there believing the said false pretenses and representations so made as aforesaid by the said Charles H. Laurence, and being deceived thereby, was induced by reason of the false pretenses and representations so made as aforesaid to deliver, and did then and there deliver to the said Charles H. Laurence the said two horse cars, numbered respectively seven (7) and eight (8) of the said Lockport Street Railroad Company, of the proper goods, chattels and personal property of the said Lockport Street Railroad Company, and the said Charles H. Laurence did then and there feloniously receive and

obtain the said proper goods, chattels and personal property of the said Lockport Street Railroad Company by means of the false pretenses and representations as aforesaid, with intent to deprive and defraud the said Lockport Street Railroad Company, feloniously, and of the use and benefit thereof and to appropriate the same to his own use.

Whereas, in truth and fact, the said Charles H. Laurence did not then, nor at any time, ship to Buffalo the said two horse cars, numbered respectively seven (7) and eight (8), to be transformed so that they might be run by electricity as a motive power instead of by horse power, and did not intend to have the said two horse cars so transformed, and did not return and intend to return the said two horse cars so transformed to the barn of the said Lockport Street Railroad Company, in the said city of Lockport, with all possible speed and fit and ready to be used upon the tracks of the said Lockport Street Railroad Company before the first day of January, 1892, and has never since returned the said cars to the Lockport Street Railroad Company, but sold the said two horse cars and appropriated the proceeds to his own use and benefit.

And whereas, in truth and in fact, the pretenses and representations so made as aforesaid by the said Charles H. Laurence, to the said Lockport Street Railroad Company, were then and there in all respects utterly false and untrue, as he, the said Charles H. Laurence, at the time of making the same, then and there well knew.

And the said Charles H. Laurence, on the day and in the year aforesaid, at the city of Lockport, within the said county of Niagara, aforesaid, in the manner and form aforesaid, and by the means aforesaid, obtained from the possession of the owner thereof, the said Lockport Street Railroad Company, the said two horse cars, numbered respectively seven (7) and eight (8), of the worth and value of three hundred and seventy-five dollars each car, with intent to deprive and defraud the true owner, the said Lockport Street Railroad Company, of its property, and of the use and benefit thereof, and to appropriate to the use of him, the said Charles H. Laurence; and the said two horse cars, he, the said Charles H. Laurence, from the possession of the true owners thereof, the said Lockport Street Railroad Company, by means of the false pretenses and representations so made as aforesaid, feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

P. F. KING, District Attorney of Niagara County,66

[66. People v. Laurence, 137 N. Y. 518, holding that the above indictment sufficiently charged a larceny and that it would have been sufficient if the indictment, without setting forth the false pretenses, had charged larceny in the form used in common law indictments.]

# FORM 65.

# Larceny-Grand Larceny in Obtaining Goods Under False Pretenses.

COURT OF THE GENERAL SESSIONS OF THE PEACE,
In and for the City and County of New York.
of the State of New York against Louis J. Rothstein

The People of the State of New York against Louis J. Rothstein.

The grand jury of the county of New York by this indictment accuse Louis J. Rothstein of the crime of grand larceny in the first degree committed as follows:

Heretofore, to wit, on the 8th day of August, in the year of our Lord one thousand nine hundred and two, at the Borough of Manhattan, in the city, county and State of New York, the said Louis J. Rothstein was engaged in business as a manufacturer of cloaks and suits and as a member of the copartnership firm of Rothstein & Schiffman, composed of the said Louis J. Rothstein and Barnet Schiffman, doing business under the firm name and style of Rothstein & Schiffman; and on the day and year aforesaid, at the city and county aforesaid, Otto A. Schreiber and Ida Schreiber were copartners under the firm name and style of Forstman & Company, and were engaged in business as commission merchants dealing in foreign and domestic woolens and other cloths; and on the day and in the year aforesaid, at the borough and county aforesaid, the corporation called Marshall Field & Company was engaged in business as well in the said borough, city, county and State of New York as elsewhere, as wholesale and retail dealers among other things, in cloaks and suits, such as were manufactured by the said Louis J. Rothstein and Barnet Schiffman, and the said corporation was then and there a concern of great wealth, undoubted credit and solvency, and amply able to meet any debt or obligation which it might incur, and the said corporation had then and there an agent and employee, to wit: one Albert A. Fitch, who was then and there and at all times, for more than one year prior to the said eighth day of August, 1902, such agent and employee of the said corporation, and it was then and there and for more than one year prior to the said eighth day of August, 1902, his special and peculiar duty to make purchases for and on behalf of the said corporation in the said Borough of Manhattan, and in the city of New York, and he was then and there at all times aforesaid generally known to the merchants of the said borough and city as the New York buyer for the said corporation. And afterwards, to wit, on the said eighth day of August, 1902, at the Borough of Manhattan, in the said county of New York, the said Louis J. Rothstein, with force and arms, with intent to deprive and defraud the said Otto A. Schreiber and Ida Schreiber, such copartners as aforesaid, of the proper moneys, goods, chattels and personal property hereinafter mentioned and of the use and benefit thereof, and to appropriate the same to his own use, did then and there feloniously, fraudulently and falsely pretend and represent

to the said Otto A. Schreiber and Ida Schreiber: That the said corporation had theretofore given to him, the said Louis J. Rothstein, an order for six thousand garments of covert cloth, requiring twenty-four thousand yards of covert cloth for the manufacture thereof, and that he, the said Louis J. Rothstein, had already accepted the said order, and that the said corporation was obliged to pay him, the said Louis J. Rothstein, for the said garments as and when the same should be delivered; that the New York buyer of the said corporation had theretofore on behalf of the said corporation given to him, the said Louis J. Rothstein, an order for six thousand garments of covert cloth requiring twenty-four thousand yards of covert cloth for the manufacture thereof, and that he, the said Louis J. Rothstein, had already accepted the said order, and that the said corporation was obliged to pay him, the said Louis J. Rothstein, for the said garments as and when the same should be delivered; that the said corporation had theretofore given to the said copartnership firm of Rothstein & Schiffman an order for six thousand garments of covert cloth, requiring twenty-four thousand yards of covert cloth for the manufacture thereof, and that the said last named copartnership had already accepted the said order, and that the said corporation was obligated to pay said last named copartnership firm for the said garments as and when the same should be delivered; and that the New York buyer of the said corporation had theretofore, on behalf of the said corporation, given to the said copartnership firm of Rothstein & Schiffman, an order for six thousand garments of covert cloth, for the manufacture thereof, and that the said last named copartnership firm had already accepted the said order, and that the said corporation was obligated to pay said last named copartnership firm for the said garments as and when the same should be delivered.

And the said Otto A. Schreiber and Ida Schreiber, then and there believing the said false and fraudulent pretenses and representations so made as aforesaid by the said Louis J. Rothstein, and being deceived thereby, were induced, by reason of the false and fraudulent pretenses and representations so made as aforesaid, to and did then and there give and deliver to the said Louis J. Rothstein, eighteen pieces of covert cloth (each piece containing fifty yards of covert cloth), of the value of eighty-three and one-half dollars each piece, of the proper moneys, goods, chattels and personal property of the said Otto A. Schreiber and Ida Schreiber, such copartners as aforesaid; and that the said Louis J. Rothstein did then and there feloniously receive and obtain the said proper moneys, goods, chattels and personal property from the possession of the said last named copartners, by color and aid of the false and fraudulent pretenses and representations aforesaid, with intent to deprive and defraud the said last named copartners of the same and of the use and benefit thereof, and to appropriate the same to his own use.

"Whereas, in truth and in fact, the said corporation had not theretofore given to him, the said Louis J. Rothstein, an order for six thousand garments of covert cloth requiring twenty-four thousand yards of covert cloth

for the manufacture thereof, nor had he, the said Louis J. Rothstein, already accepted the said order, nor was the said corporation obligated to pay him, the said Louis J. Rothstein, for the said garments as and when the same should be delivered; nor had the New York buyer of the said corporation theretofore, on behalf of the said corporation, given to him, the said Louis J. Rothstein, an order for six thousand garments of covert cloth, requiring 24.000 yards of covert cloth for the manufacture thereof, nor had he, the said Louis J. Rothstein, already accepted the said order, nor was the said corporation obligated to pay him, the said Louis J. Rothstein, for the said garments as and when the same should be delivered, nor had the said corporation theretofore given to the said copartnership firm of Rothstein & Schiffman an order for six thousand garments of covert cloth requiring twenty-four thousand yards of covert cloth for the manufacture thereof, nor had said last named copartnership firm already accepted the said order, nor was said corporation obligated to pay said last named copartnership firm for the said garments as and when the same should be delivered; nor had the New York buyer of the said corporation, theretofore on behalf of the said corporation, given to the said copartnership firm of Rothstein & Schiffman an order for six thousand garments of covert cloth requiring twenty-four thousand yards of covert cloth for the manufacture thereof, nor had said last named copartnership firm already accepted the said order, nor was the said corporation obligated to pay said last named copartnership firm for the said garments as and when the same should be delivered; all of which he, the said Louis J. Rothstein, then and there well knew.

And whereas, in truth and in fact, the said pretenses and representations so made as aforesaid by the said Louis J. Rothstein to the said Otto A. Schreiber and Ida Schreiber was and were, each and everyone of them, then and there in all respects utterly false and untrue, as he, the said Louis J. Rothstein, at the time of making the same then and there well knew.

And so, the grand jury aforesaid do say that the said Louis J. Rothstein, in the manner and form aforesaid, by the means aforesaid, the said proper moneys, goods, chattels and personal property of the said Otto A. Schreiber and Ida Schreiber then and there feloniously did steal, against the form of the statute in such case made and provided, and against the peace and dignity of the said people.

WM. TRAVERSE JEROME,

District Attorney.67

[67. In People v. Rothstein, 180 N. Y. 148, 72 N. E. 999, a judgment of conviction on the above indictment was affirmed.]

### FORM 66.

# Larceny-Grand Larceny in First Degree.

The grand jury of the county of New York, by this indictment accuse Ignatius L. Qualey, Frank S. Weller, Ewan H. Clark, otherwise called Charles Carbonell, and Frederick Herbert, otherwise called Lawrence Summerfield, of the crime of grand larceny in the first degree, committed as follows:

The said Ignatius L. Qualey, Frank S. Weller, Ewan H. Clark, otherwise called Charles Carbonell, and Frederick Herbert, otherwise called Charles Lawrence Summerfield, all late of the borough of Manhattan, of the city of New York, in the county of New York, aforesaid, on the fifth day of March, in the year of our Lord one thousand nine hundred and two, at the borough and county aforesaid, with intent to deprive and defraud George W. Effinger of the proper moneys, goods, chattels, and personal property hereinafter mentioned and of the use and benefit thereof and to appropriate the same to their own use, did then and there feloniously and fraudulently, falsely pretend and represent to the said George W. Effinger:

That a certain corporation called the Horseshoe Copper Mining Company, the capital stock of which said corporation then consisted of one hundred thousand shares of the par value of ten dollars each share, then owned mining land in the territory of Arizona, exceeding in value the amount of such capital stock, and had theretofore issued the twelve hundred of its said shares, hereinbelow referred to, to an engineer formerly employed by the said corporation for services rendered by him as such engineer, and that the said Ewan H. Clark, otherwise called Charles Carbonell, was then and there such engineer, and that he, the said Ewan H. Clark, otherwise called Charles Carbonell, was then and there confined to his bed by sickness and had sometime theretofore been compelled by sickness to leave the employment of the said corporation and that since he, the said Ewan H. Clark, otherwise called Charles Carbonell, had so left the employment of the said corporation, and within a few weeks immediately preceding the said fifth day of March, nineteen hundred and two, a vein of rich ore had been discovered in a mine of the said corporation, and that he the said Ewan H. Clark, otherwise called Charles Carbonell, was then and there ignorant of the discovery of the said vein, and that by reason of the discovery of the said vein of ore the stock of the said corporation was then and there well worth fourteen dollars and fifty cents each share and that since the discovery of the said vein of ore and within the said few weeks the said Ignatius L. Qualey had purchased from the owners thereof divers shares of the stock of the said corporation, and had paid not less than eleven dollars for each of such shares, and that the said Ignatius L. Qualey was then and there ready and willing to purchase and desirous of purchasing the twelve hundred shares of stock then so held as aforesaid by the said Ewan H. Clark, otherwise called Charles Carbonell, and of paying therefor the sum of fourteen dollars and fifty cents for each share thereof.

and that three certificates for twelve hundred shares of the said capital stock of the said corporation, which he, the said Ewan H. Clark, otherwise called Charles Carbonell, and did then and there purchase from him, the said Ewan H. Clark, otherwise called Charles Carbonell, and for which he, the said George W. Effinger then and there paid the sum of seven thousand five hundred dollars, were then and there well worth the sum of seventeen thousand four hundred dollars, and that the said Ignatius L. Qualey was then and there able, willing and desirous of then and there paying the said sum of seventeen thousand and four hundred dollars therefor.

And the said George W. Effinger, then and there believing the said false and fraudulent pretenses and representations so made as aforesaid by the said Ignatius L. Qualey, Frank S. Weller and Ewan H. Clark, otherwise called Charles Carbonell, and Frederick Herbert, otherwise called Lawrence Summerfield, and being deceived thereby, was induced by reason of the false and fraudulent pretenses and representations so made as aforesaid, to deliver, and did then and there deliver, to the said Ignatius L. Qualey, Frank S. Weller, Ewan H. Clark, otherwise called Charles Carbonell, and Frederick Herbert, otherwise called Lawrence Summerfield, the sum of seven thousand five hundred dollars in money, lawful money of the United States of America. and of the value of seven thousand five hundred dollars of the proper moneys, goods, chattels and personal property of the said George W. Effinger. And the said Ignatius L. Qualey, Frank S. Weller, Ewan H. Clark, otherwise called Charles Carbonell, and Frederick Herbert, otherwise called Lawrence Summerfield, did then and there feloniously receive and obtain the said proper moneys, goods, chattels and personal property from the possession of the said George W. Effinger by color and by aid of the false and fraudulent pretenses and representations so made as aforesaid with intent to deprive and defraud the said George W. Effinger of the same and of the use and benefit thereof and to appropriate the same to their own use.

Whereas, in truth and in fact, the said corporation called the Horseshoe Copper Mining Company did not then own mining lands in the territory of Arizona or elsewhere exceeding or equalling in value the amount of its capital stock, but all of the mining lands then owned by the said corporation was then worth less than the amount of ten thousand dollars, and the said corporation had not theretofore issued the said twelve hundred of its said shares to an engineer formerly employed by the said corporation or for services rendered by any such engineer, and the said Ewan H. Clark, otherwise called Charles Carbonell, was not then and there and had never been such engineer, and he, the said Ewan H. Clark, otherwise called Charles Carbonell, was not then and there confined to his bed by sickness or otherwise, and had never been compelled by sickness to leave the employment of the said corporation, and within the said few weeks immediately preceding the said fifth day of March, ninteen hundred and two, and since the said twelve hundred shares of stock had been issued to the said Ewan H. Clark, otherwise called Charles

Carbonell, no vein of rich or any other ore, had been discovered in any mine of the said corporation, and such stock was not by reason of the discovery of any such vein, or for any other reason, then and there well worth fourteen dollars and fifty cents each share, but on the contrary the said stock was then and there worth less than five dollars per share, and the stock of such corporation could then be bought for the sum of five dollars a share as they, the said Ignatius L. Qualey, Frank S. Weller, Ewan H. Clark, otherwise called Charles Carbonell, and Frederick Herbert, otherwise called Lawrence Summerfield, then and there well knew, and within the said few weeks the said Ignatius L. Qualey had not purchased any shares of the outstanding stock of the said corporation, and had not paid eleven dollars a share for any of such shares; and the said Ignatius L. Qualey was not then and there willing and ready to purchase or desirous of purchasing the said twelve hundred shares of the stock of the said corporation then held by the said Ewan H. Clark, otherwise called Charles Carbonell, or of paying therefor the sum of fourteen dollars and fifty cents for each share thereof, or any other sum, and the said certificates for twelve hundred shares of the said capital stock of the said corporation were not then and there worth the sum of seventeen thousand four hundred dollars, but on the contrary were worth less than the sum of six thousand dollars, and the said Ignatius L. Qualey was not then and there able, willing or desirous of then and there paying the said sum of seventeen thousand four hundred dollars therefor.

And whereas, in truth and in fact, the pretenses and representations so made as aforesaid by the said Ignatius L. Qualey, Frank S. Weller, Ewan H. Clark, otherwise called Charles Carbonell, and Frederick Herbert, otherwise called Lawrence Summerfield, were then and there in all respects utterly false and untrue as they, the said Ignatius L. Qualey, Frank S. Weller, Ewan S. Clark, otherwise called Charles Carbonell, and Frederick Herbert, otherwise called Lawrence Summerfield, then and there at the time of making the same well knew:

And so the grand jury aforesaid do say that the said Ignatius L. Qualey, Frank S. Weller, Ewan H. Clark, otherwise called Charles Carbonell, and Frederick Herbert, otherwise called Lawrence Summerfield, in the manner and form aforesaid, and by the means aforesaid, the said moneys, goods, chattels and personal property of the said George W. Effinger, then and there feloniously did steal, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

### Second Count.

And the grand jury aforesaid, by this indictment further accuse the said Ignatius L. Qualey, Frank S. Weller, Ewan H. Clark, otherwise called Charles Carbonell, and Frederick Herbert, otherwise called Lawrence Summerfield, of the crime of grand larceny in the first degree, committed as follows:

The said Ignatius L. Qualey, Frank S. Weller, Ewan H. Clark, otherwise

called Charles Carbonell, and Frederick Herbert, otherwise called Lawrence Summerfield, all late of the borough and county aforesaid, on the day and in the year aforesaid, at the borough and county aforesaid, the sum of seven thousand five hundred dollars in money, lawful money of the United States of America, and of the value of seven thousand five hundred dollars of the goods, chattels and personal property of one George W. Effinger, then and there being found, then and there feloniously did steal, take and carry away, against the form of the statute in such case made and provided and against the peace of the people of the State of New York and their dignity.

WM. TRAVERS JEROME,

District Attorney.68

[68. In People v. Summerfield, 180 N. Y. 511, 72 N. E. 1147, a judgment of conviction on the above indictment was affirmed without opinion.]

# FORM 67.

#### Larceny.

The State of South Carolina, county of Marlboro. At a court of General Sessions begun and holden in and for the county of Marlboro, in the State of South Carolina, at Bennettsville, in the county and State aforesaid, on the third Monday of October, in the year of our Lord one thousand nine hundred and five, the jurors of and for the county aforesaid, upon their oath present. that Eliza Thomas and Anna Hearsey, otherwise called Anna Rogers, late of the county and State aforesaid, on the ninth day of June, in the year of our Lord one thousand nine hundred and five, with force and arms, at Bennettsville, in the county and State aforesaid, three finger rings of the value of one hundred and fifty dollars, of the proper goods and chattels of Mrs. Sallie Douglass then and there being found, feloniously did steal, take and carry away against the form of the statute in such case made and provided, and against the peace and dignity of the State. And the jurors aforesaid. upon their oath aforesaid, do further present that Eliza Thomas, on the ninth day of June, in the year of our Lord one thousand nine hundred and five, with force and arms, at Bennettsville, in the county and State aforesaid, three finger rings of the value of one hundred and fifty dollars, of the proper goods and chattels of Mrs. Sallie Douglass then and there being found feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the State. And the jurors aforesaid, upon their oath aforesaid, do further present, that Anna Hearsey, otherwise called Anna Rogers, late of the county and State aforesaid, on the ninth day of June, in the year of our Lord one thousand nine hundred and five, with force and arms, at Bennettsville, in the county and State aforesaid, three finger rings of the value of one hundred and fifty

dollars, of the proper goods and chattels of Mrs. Sallie Douglass, by Eliza Thomas, then lately before feloniously stolen, taken and carried away, of and from the said Eliza Thomas unlawfully, unjustly and for the sake of wicked gain, did buy and receive, she, the said Anna Hearsey, knowing the aforesaid goods and chattels to have been lately before feloniously stolen, taken and carried away against the form of the statute in such cases made and provided, and against the peace and dignity of the State.69

[69. State v. Thomas, 75 S. C. 477, 55 S. E. 894.]

# FORM 68.

#### Larceny.

STATE OF WEST VIRGINIA, RANDOLPH COUNTY, TO WIT:

In the Circuit Court thereof, September Term, 1882.

Found upon the evidence of John Mann, A. P. T. Wilson, Martin Pfan, J. J. Buckley, G. W. Buckey, J. D. Wilson and A. W. Suiter, witnesses sworn in open court, and sent before the grand jury to testify at the instance of the prosecuting attorney.

CYRUS A. SCOTT,

Prosecuting Attorney.70

[70. State v. Vest, 21 W. Va. 796.]

# FORM 69.

#### Larceny and Embezzlement.

STATE OF NEW YORK, YATES COUNTY, SS.:

The jurors of the people of the State of New York, and for the body of the county of Yates aforesaid, upon their oath do present:

That William S. Coats, of the town of Jerusalem, in the county of Yates, and Matilda Coats, wife of the said William S. Coats, of the town of Jerusalem, in the said county of Yates, on the twenty-eighth day of December, in the year of our Lord one thousand eight hundred and fifty-six, at the town of Jerusalem, in the county of Yates, were agents to Adam Clark, as the

superintendent of the poor of the county of Yates, and keepers of the county poor house in and for the county of Yates, employed as such by and under the said Adam Clark, as such superintendent as aforesaid, and employed and entrusted as such agent and keepers by the said Adam Clark, as such superintendent as aforesaid, to receive and take charge for him, the said such superintendent of the poor of the county of Adam Clark, as Yates, of goods, chattels and personal property, pork, hams, forks, crockery, beef, meat, fowls, wool, knives and sugar, cattle, and other stock, provisions, groceries, household articles and furniture, wheat and other grain and farm produce, and farm stock. And being then and there such agents and keepers so employed and trusted as aforesaid. the said William S. Coats and the said Matilda Coats, by virtue of such employment and entrustment, did then and there receive and take into their possession, for and on account of the said Adam Clark, as such superintendent of the poor of the county of Yates, their said principal and employer, one barrel of lard, of the value of sixty dollars; three hundred pounds of lard, of the value of sixty dollars; two half firkins of butter, of the value of twenty-five dollars; eighty chickens, of the value of twelve dollars; thirty ducks, of the value of six dollars; twelve turkeys, of the value of four dollars; one hundred and fifty fowls, of the value of twenty dollars; eighty pounds of butter, of the value of sixteen dollars; one thousand pounds of pork, of the value of one hundred dollars; three hundred and fifty pounds of pork in the hog, of the value of twenty-five dollars; eight hundred and twenty pounds of pork hams, smoked, of the value of eighty-two dollars (here followed a list of many more articles which it is unnecessary to repeat), belonging to the said superintendent of the poor of the county of Yates; and having so received and taken into their possession the said one barrel of lard, three hundred pounds of lard, two half firkins of butter, eighty chickens, thirty ducks, twelve turkeys, one hundred and fifty fowls, eighty pounds of butter, one thousand pounds of pork, and the said other goods, chattels, personal property and effects aforesaid, for and on account of their said employer and principal, afterwards, to wit, on the day, in the year aforesaid, at the town, in the county aforesaid, they, the said William S. Coats and Matilda Coats, then and there, with force and arms, without the assent of the same Adam Clark, as superintendent, as aforesaid, their said employer and principal, the same goods, chattels, personal property and effects aforesaid, so intrusted to them as aforesaid, did unlawfully, fraudulently and feloniously take, embezzle, carry away and convert to their own use, contrary to the trust and confidence reposed in them, the said William S. Coats and Matilda Coats, by the said Adam Clark, as such superintendent of the poor aforesaid, to the great damage of the said Adam Clark, as such superintendent of the poor aforesaid, and other people of the county of Yates, contrary to the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oaths aforesaid, do further present: That the said William S. Coats and Matilda Coats, on the twenty-eighth day of December, in the year of our Lord one thousand eight hundred and fifty-six, at the town of Jerusalem, in the county of Yates, with force and arms, one barrel of lard, of the value of sixty dollars (enumerating the same articles as in the first count), the goods, chattels and personal property of Adam Clark, as superintendent of the poor of the county of Yates, then and there being found, then and there feloniously and unlawfully did steal, take and carry away, contrary to the form of the statute in such case made and provided, to the great damage of the said superintendent of the poor of the county of Yates and the people of the county of Yates, and against the peace of the people of the State of New York, and their dignity.

H. M. STEWART,

District Attorney.71

[71. Coats v. The People, 4 Park. Cr. Rep. (N. Y.) 662, 664. This was an indictment against husband and wife for the embezzlement and larceny of property charged to belong to one as superintendent of the poor of the county.]

# FORM 70.

# Libel.

PROVIDENCE, S. C.:

At the Court of Common Pleas of the State of Rhode Island and Providence Plantations, holden at Providence, within and for the county of Providence, on the first Monday of March, in the year of our Lord one thousand eight hundred and eighty-one. The grand jurors of the State of Rhode Island and Providence Plantations, in and for the county of Providence, upon their oaths present: That Alonzo Spear, yeoman, and Frank E. Corbett, yeoman, both of or commorant of Providence, in said county, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and eighty, with force and arms, at Providence aforesaid, in the aforesaid county of Providence, unlawfully and maliciously contriving and intending to villify and defame one James O. Swan, who on the day aforesaid, and long prior thereto, was and had been a police constable in said Providence, in said county and State, and employed as a detective in said Providence, in said county and State, and who before said date last mentioned went to South Kingstown, in the county of Washington, in said State, for the purpose of ascertaining who had possession of the freight, cargo and property which had come on shore from the steamer Rhode Island, which said steamer had been wrecked off the coast of said South Kingstown, on the to wit ---- day of \_\_\_\_, in the year of our Lord one thousand eight hundred and eighty,

before said first mentioned date, and to injure him, the said James O. Swan, both as an individual and as police constable and detective, with force and arms, at said city of Providence, in said county of Providence, in said State of Rhode Island, on the said twenty-sixth day of December, in the year of our Lord one thousand eight hundred and eighty, did unlawfully, wickedly and maliciously compose and publish and cause and procure to be composed and published in a certain newspaper called the "Sunday Morning Transcript," published and circulated in said Providence, in said county and State, by Alonzo Spear and said Frank E. Corbett, said Alonzo Spear being the proprietor and Frank E. Corbett the editor thereof, said newspaper, on the day, month and year first aforesaid, having been published and circulated as aforesaid, by said Alonzo Spear and said Frank E. Corbett, at said Providence, in said county and State, on said twenty-sixth day of December, in the year of our Lord one thousand eight hundred and eighty, a certain false, scandalous, wicked, malicious, mischievous and defamatory libel of and concerning him, the said James O. Swan, containing the false, scandalous, wicked, malicious, mischievous and defamatory and libelous words and matters according to the tenor following, that is to say: "Detective Swan (meaning the said James O. Swan) holds at present some one and a half tons of rubber, picked up at the wreck of the steamer Rhode Island (meaning the wreck of the steamer Rhode Island, wrecked as aforesaid, on the coast of said South Kingstown). Boston parties shipped quantities of rubber on that steamer, and of the same kind that Swan (meaning the said James O. Swan) now holds, but, of course, the marks of identification have been effaced, and they cannot prove their property, and so Swan (meaning the said James O. Swan) holds it, and will undoubtedly eventually sell it (meaning that said James O. Swan has taken possession of and holds rubber from those lawfully entitled to the possession thereof, with the intention of selling the same, instead of delivering the same into the possession of those lawfully entitled thereto). The question is, what did Detective Swan (meaning said James O. Swan) leave this city for (meaning said city of Providence) and go to the scene of the wreck? (meaning the place where said steamer Rhode Island was wrecked)? Did he (meaning said James O. Swan) go to protect the property from thieves, and assist in its saving, or did he (meaning said James O. Swan) go for the purpose of scooping in what he (meaning said James O. Swan) could lay his (meaning said James O. Swan's) hands upon? (Meaning, in connection with the aforegoing, to charge by interrogation and insinuation that said James O. Swan, instead of going to said place for a proper purpose, went there for the purpose of unlawfully and improperly taking possession of and appropriating to his own use and benefit, property from said wreck). It don't seem probable that citizen taxpayers would sanction the idea of paying a man \$3.50 per day to go on a wrecking cruise and keep all the spoils he could get. (Meaning that said James O. Swan, being employed by the city of Providence, and going to the place of said wreck, abused the purpose for which he went, by unlawfully and improperly keeping and appropriating to himself, for his own use

and benefit and profit, property which might come into his sion said wreck.) from Ιf all the policemen who were  $\mathbf{the}$ wreck of the Rhode Island (meaning said steamer Rhode Isacted in the same way (meaning in the way charged aforesaid in said publication as by the inuendoes aforesaid), a grace of greater magnitude would rest upon the force (meaning the police force of said city of Providence) than there is at present upon it" (meaning said force; meaning that the conduct of said James O. Swan, in connection with the wreck and with property therefrom, has brought disgrace upon the police force of said city of Providence). To the great injury, scandal and disgrace of the said James O. Swan and against the form of the statute in such case made and provided, and against the peace and dignity of the State.

Preferred by

SAMUEL P. COLT.

Assistant Attorney General.72

[72. State v. Spear & Corbitt, 13 R. I. 324-326. It was held in this case that an indictment for libel is good if it charges the publication of matter not libellous per se, but charges such publication with proper inducement and inuendos to set forth and explain the defamatory statements of the publication.]

# FORM 71.

# Malicious Injury to Property.

STATE OF INDIANA, BOONE COUNTY:

Boone Circuit Court, October term, eighteen hundred and forty-five.

The grand jurors for the State of Indiana, impanelled, sworn and charged, to inquire within and for the body of the county of Boone aforesaid, upon their oath present that John Slocum, late of said county, on the tenth of April, in the year eighteen hundred and forty-five, did unlawfully, maliciously and mischievously destroy and injure, and cause to be destroyed and injured, a certain mare, the goods and chattels of one Gabriel Griffins, then and there being, of the value of fifty dollars, by then and there fastening and causing to be fastened boards to the tail of said mare, to the damage of the said Gabriel Griffins of twenty-five dollars, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.73

[73. State v. Slocum, 8 Black (Ind.), 315, holding that an indictment having a venue in the margin sufficiently showed the place where the offense was committed where worded as above.]

# FORM 72.

#### Malicious Mischief.

TIOGA COUNTY, SS..

The jurors of the people of the State of New York, in and for the body of the county of Tioga aforesaid, to wit, Lorain Curtis, etc., good and lawful men of the said county of Tioga, then and there being duly sworn and charged upon their oaths to inquire for the people of the said State of New York, in and for the body of the county of Tioga aforesaid, upon their oaths aforesaid, present:

That William Moody, late of the town of Owego, in the county of Tioga aforesaid, on or about the twenty-third day of July, in the year of our Lord one thousand eight hundred and sixty-two, at the town of Owego aforesaid, unlawfully, wilfully and maliciously intending to injure one David Taylor. then of the town of Tioga, in said county of Tioga, and disturb the of the people of the  $\mathbf{said}$ State of New York, of wantonness spirit and black and diabolical revenge, he, the said William Moody, then and there held against the said David Taylor, without just cause did, at the time and place first aforesaid, to wit. on the twenty-third day of July, in the year of our Lord one thousand eight hundred and sixty-two, at the town of Owego aforesaid, feloniously, maliciously and mischievously and in a secret and clandestine manner, with some sharp instrument which he, the said William Moody, in his right hand then and there held, cut, sever, hack and otherwise disfigure the reins and tugs and other useful appendages of a certain single one-horse harness of the value of fifteen dollars, the property, goods and chattels of the said David Taylor (and the said William Moody then and there well knowing the said harness to be the property, goods and chattels of said David Taylor), thereby damaging, injuring and partly destroying said harness and the tugs and reins and other useful appendages aforesaid belonging to the same, and rendering the same nearly useless, and with the wicked, felonious and malicious intent aforesaid, against the peace of the people of the State of Nw York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Moody, late of the town of Owego aforesaid, on or about the twenty-third day of July, in the year of our Lord one thousand eight hundred and sixty-two, at the town of Owego aforesaid, with force and arms, feloniously, maliciously and mischievously, and from a spirit of mere wantonness and revenge, which he, the said William Moody, then and there held against the said David Taylor, and in a secretly sly and clandestine manner did cut, sever and otherwise disfigure, damage and injure, by the use of some sharp instrument to these jurors unknown, which he, the said William Moody, in his right hand then and there held, a certain one-horse harness, of the value of fifteen dollars, the property of the said David Taylor, and then and

there in his possession, against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said William Moody, late of the town of Owego aforesaid, on about the twenty-third day of July, in the year of our Lord one thousand eight hundred and sixty-two, at the town of Owego aforesaid, with force and arms, unlawfully, wilfully and maliciously intending to injure one David Taylor, did feloniously, knowingly and maliciously, and in a spirit of mere wantonness and revenge, and without any hope or expectation of gain or advantage, and in a secret and stealthy manner, in the day time, cut, sever, damage and destroy a certain one-horse harness of the value of fifteen dollars, of the goods and chattels of the said David Taylor, and then and there in his possession, against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Moody, late of the town of Owego and county aforesaid, on or about the twenty-third day of July, in the year of our Lord one thousand eight hundred and sixty-two, at the town of Owego aforesaid, with force and arms, did feloniously, maliciously and wantonly, and in a secret and clandestine manner, injure and deface, by the use of some sharp instrument, to these jurors unknown, which he, the said William Moody, in his right hand then and there held, a certain one-horse harness, of the value of fifteen dollars, of the goods and chattels of one David Taylor, and then and there in his possession, and then and there being the product and work of art, and then and there situate on private ground in the town of Owego aforesaid, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

D. O. HANCOCK,

District Attorney.74

[74. People v. Moody, 5 Park. Cr. R. (N. Y.) 568.]

# FORM 73.

# Manslaughter.

DISTRICT COURT OF POTTAWATTAMIE COUNTY, IOWA, NOVEMBER TERM, 1873. The State of Iowa v. Thomas E. Davis.

The grand jury of the county of Pottawattamie, in the name and by the authority of the State of Iowa, accuse Thomas E. Davis of the crime of manslaughter, committed as follows: For that the said Thomas E. Davis, on the 28th day of August, A. D. 1873, in the said county of Pottawattamie, and State of Iowa, wilfully, deliberately, premeditatedly and of his malice aforethought, and with intent to kill and murder one Charles Granville, feloniously did strike, stab and cut the said Charles Granville, across his

(the said Charles Granville's) abdomen, with a certain knife which he, the said Thomas E. Davis, then and there had and held in his hand; then and there inflicting a mortal wound of which said wound, so inflicted, as aforesaid, by the said Thomas E. Davis, the said Charles Granville then and there died.

So that the grand jury aforesaid say that the said Thomas E. Davis, on the 28th day of August, A. D. 1873, at the county of Pottawattamie, in the State of Iowa, in manner and form as aforesaid, did wilfully, deliberately, premeditatedly and of his malice aforesaid, feloniously kill and murder the said Charles Granville, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Iowa.

#### H. K. McJUNKIN.

District Attorney, Thirteenth Judicial District of Iowa.75

[75. State v. Davis, 41 Iowa, 311, 312, holding that where an offense is correctly described in the statement of facts the indictment will be good though the offense is designated by another name in the charging part and that a conviction for the offense described will be sustained.]

# FORM 74.

# Manslaughter.

Marco Matakovich, Jr., is accused by the grand jury of the county of St. Louis, by this indictment of the crime of manslaughter in the first degree, committed as follows: The said Marco Matakovich, Jr., on the 18th day of February, A. D. 1894, at Soudan, near the city of Tower, in the said county of St. Louis and State of Minnesota, without the authority of law, but without a design to effect his death, feloniously did kill and murder one Mat Vivada, a human being, by then and there striking him upon the head with a shovel, thereby inflicting on him a mortal wound of which mortal wound he the said Mat Vivada died at Soudan aforesaid on the 18th day of February, 1894. That such killing was neither justifiable nor excusable. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Minnesota.

Dated at Duluth, in the said county of St. Louis, and State of Minnesota, on the 3rd day of April, A. D. 1894.

#### HARVEY A. WING,

Foreman of the Grand Jury.76

[76. State v. Matakovich, 59 Minn. 514, 515, holding that the fact that the crime was committed "in the heat of passion" was a mitigating, not a differentiating, circumstance, so that a failure to allege the fact, or failure to prove it, could not have prejudiced the defendant. Form used for indictment for manslaughter in the second degree.]

# FORM 75.

## Manslaughter.

CITY AND COUNTY OF NEW YORK, SS.:

The jurors of the People of the State of New York, in and for the body of the city and county of New York, upon their oath present:

That Charles Cobel, late of the first ward of the city of New York, in the county of New York, aforesaid, on the thirtieth day of September, in the year of our Lord one thousand eight hundred and sixty-one, at the ward, city and county aforesaid, with force and arms, in and upon one Mary Ann Baker, in the peace of the People of the State of New York then and there being, she, the said Mary Ann Baker, being then and there pregnant with a quick child, feloniously and wilfully did make an assault, and that the said Charles Cobel then and there did wilfully and feloniously use and employ on and upon the womb and body of the said Mary Ann Baker a certain instrument to the jurors aforesaid unknown, with intent thereby then and there feloniously to destroy the said quick child, the same not then and there being necessary to preserve the life of the said Mary Ann Baker, the mother of the said quick child, and not having then and there been advised by two physicians to be necessary for that purpose, by means whereof the death of the said quick child was thereby produced, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Charles Cobel, late of the ward, city and county aforesaid, afterwards, to wit, on the day and in the year aforesaid, at the ward, city and county aforesaid, with force and arms, in and upon the said Mary Ann Baker, then and there being, and being then and there pregnant with a quick child, feloniously and wilfully did make another assault; and that the said Charles, a certain instrument, the name whereof is to the jurors aforesaid unknown, which he, the said Charles, in his right hand then and there had and held, into her, the said Mary Ann, and into and upon the womb of her, the said Mary Ann, did feloniously thrust, push and press, and did then and there wilfully and feloniously use and employ the said instrument upon the said Mary Ann, in manner aforesaid, with intent feloniously to destroy the said quick child. the same not then and there being necessary to preserve the life of the said Mary Ann, the mother of said child, and not having been advised by two physicians to be necessary for that purpose, whereby and by means whereof, the said child became and was then and there weak, debilitated, and mortally sick and distempered in body, of which said weakness, debilitation, mortal sickness and distemper, so occasioned as aforesaid, the said child then and there did die.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Charles Cobel, the said child, in manner and form, and by the means aforesaid, on the day and in the year aforesaid, at the ward, city and county

aforesaid, wilfully and feloniously did kill and slay against the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

NELSON J. WATERBURY,

District Attorney.76

[76. Cobel v. The People, 5 Park. Cr. R. (N. Y.) 349.]

# FORM 76.

# Manslaughter.

CITY AND COUNTY OF NEW YORK, SS.:

The jurors of the people of the State of New York, and for the body of the city and county of New York, upon their oath present: That Elijah Hunt, late of the tenth ward of the city of New York, in the county of New York aforesaid, on the first day of January, in the year of our Lord one thousand eight hundred and fifty-seven, at the ward, city and county aforesaid, in and upon one Hannah Lawson, she, the said Hannah Lawson, being then and there pregnant with a quick child, feloniously and wilfully did make assault, and that he, the said Elijah Hunt, did then and there feloniously and wilfully use on, in and upon the womb and body of the said Hannah Lawson, the mother of the said quick child, a certain instrument, to wit, a piece of steel wire, of the length of six inches, with the intent thereby to then and there destroy the fætal life of the said quick child, and the same not being necessary to preserve the life of her, the said Hannah Lawson, the mother of the said quick child.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Hannah Lawson, by means of the said use of the said instrument, wilfully and feloniously aforesaid, upon her womb, by the said Elijah Hunt, became mortally wounded and distempered, and of the said mortal wounding and distempering languished from the day first aforesaid until the twenty-first day of the same month aforesaid, in the same year aforesaid, when she, the said Hannah Lawson, of the said mortal wounding and distempering, died.

And so the jurors aforesaid, upon their oath aforesaid, do say that he, the said Elijah Hunt, wilfully and feloniously by the means and in the manner aforesaid, her, the said Hannah Lawson, on the day and in the year last aforesaid, did kill and slay, against the form of the statute in such case made and provided, against the peace of the people and their dignity.

Second Count—And the jurors aforesaid, upon their oath aforesaid, do further present: That, on the day and in the year first aforesaid, he, the said Elijah Hunt, wilfully and maliciously did use a certain instrument of steel wire, of the length of six inches, in and upon the womb of her, the said Hannah Lawson, at the ward, city and county aforesaid, she, the said Hannah

Lawson, being then and there big and pregnant, within her said womb, with a child, with the intent thereby to cause the said child of her, the said Hannah, to be forcibly delivered from her said womb, before the natural time of delivery thereof, and to cause her, the said Hannah Lawson, thereupon to miscarry of the said child from the womb, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

A. OAKEY HALL,
District Attorney.77

[77. Hunt v. The People, 3 Park. Cr. R. (N. Y.) 569, 570. Form used in this case for manslaughter in the second degree, for causing death by effecting an abortion, with a count for misdemeanor in using the instrument with intent to procure a miscarriage.]

# FORM 77.

### Manslaughter.

COURT OF GENERAL SESSIONS OF THE PEACE, In and for the City and County of New York.

The People of the State of New York against Charles A. Buddenseik, Charles Franck, Thomas W. Dailey (whose real christian name is to the grand jury unknown) and Robert V. Mackey.

The grand jury of the city and county of New York, by this indictment, accuse Charles A. Buddenseik, Charles Franck, Thomas W. Dailey, whose real christian name is to the grand jury aforesaid unknown, and Robert V. Mackey of the crime of manslaughter, committed as follows: Heretofore and prior to the thirteenth day of April, in the year of our Lord one thousand eight hundred and eighty-five, the said Charles A. Buddenseik and Charles Franck, each late of the city and county of New York aforesaid, did erect and construct and cause and procure to be erected and constructed, and did act and assist that were concerned in the erection and construction of a certain building within the said city and county, the same being designed and intended to be used and occupied upon its completion by human beings for dwelling purposes, the said Charles A. Buddenseik, and Charles Franck, at the time of the erecting and constructing of the said building, having the entire care, charge and control, and supervision of the same. And the said Charles A. Buddenseik and Charles Franck, so having the entire care, charge, control and supervision of the constructing and erecting of the said building, it thereon became and was their duty, at the time of such erection and construction, and until the said building should be completed, to cause the walls thereof to be properly bounded and solidly put together, and to be built to a line, and be carried up plumb and straight with close joints; and to cause all joints in the said walls to be well filled with mortar of good quality; and

to cause mortar of good quality to be used in the construction of the said walls, in order that the same should be properly and solidly put together; and to cause bricks, stones, ironwork, planks, timbers, beams, boards, and materials, of good quality and of sufficient strength, to be used in the construction of the said building; and to prevent from being used in such construction any bricks, stones, ironwork, planks, timbers, beams, boards or other material which were not of good quality and of sufficient strength; and to use and exercise every care and precaution in their power to render the said building and every part thereof safe and secure, as well during its construction as upon the completion of the same.

And the said Charles A. Buddenseik and Charles Franck, well knowing the premises, but being wholly unmindful and neglectful of their duty in that behalf, at the time of the erection and construction of the said building, and on divers days and times up to the said thirteenth day of April, in the year aforesaid, at the city and county aforesaid, did feloniously and wilfully neglect and omit to cause the walls of the said building to be properly bonded and solidly put together and to be built to a line and carried up plumb and straight with close joints; and did then and there wilfully and feloniously neglect and omit to cause the joints in the said walls to be well filled with mortar of good quality; and did then and there wilfully and feloniously neglect and omit to cause proper mortar to be used in the construction of the said walls; and did then and there wilfully and feloniously neglect and omit to cause bricks, stones, ironwork, planks, timbers, beams, boards and materials of good quality and of sufficient strength to be used in the construction of the said building; and did then and there wilfully and feloniously neglect and omit to prevent from being used in such construction divers bricks, stones, ironwork, planks, timbers, beams, boards and other materials which were not of good quality nor of sufficient strength; and did then and there wilfully and feloniously neglect and omit to use and exercise every care and precaution in their power to render the said building and every part thereof safe and secure during its construction, and upon the completion thereof; and the said Charles A. Buddenseik and Charles Franck, on the days and times aforesaid, at the city and county aforesaid, did then and there wilfully and feloniously cause, suffer and permit the walls of the said building to be improperly bonded and loosely and flimsily put together; and did then and there wilfully and feloniously cause, suffer and permit mortar of a grossly poor and inferior quality, and mortar chiefly composed of loam, to be used in the construction of the said walls; and did then and there wilfully and feloniously cause, suffer and permit divers bricks, stones, planks, beams, timbers, ironwork and other materials of poor quality and insufficient strength to be used in the construction of the said building. In consequence of which said most culpable negligence, acts and omissions on the part of them, the said Charles A. Buddenseik and Charles Franck, the said building afterwards, to wit, on the said thirteenth day of April, in the year aforesaid, did fall to the ground there. And the said Charles A. Buddenseik and

Charles Franck, by the falling of the said building in manner aforesaid, on the day and in the year aforesaid, at the city and county aforesaid, with force and arms, in and upon the body of one Louis Walters, in the peace of the People of the State of New York, then and there being in the said building before and at the time of the falling of the same, wilfully and feloniously did make an assault and him, the said Louis Walters, down upon and against the bricks, stones, planks, timbers, beams, ironwork and other component parts of the said building, did then and there, with great force and violence, wilfully and feloniously cast and throw, thereby giving unto him, the said Louis Walters, then and there in and upon the head, neck, breast, belly, back, sides and other parts of the body of him, the said Louis Walters, divers mortal bruises and contusions, of which said mortal bruises and contusions, he, the said Louis Walters, from the said thirteenth day of April, in the year aforesaid, until the fourteenth day of April, in the same year aforesaid, at the city and county aforesaid, did languish, and languishing did live, on which said fourteenth day of April, in the year aforesaid, the said Louis Walters, at the city and county aforesaid, of the said mortal bruises and contusions, died. And the said Thomas W. Dailey and Robert V. Mackey, each late of the city and county aforesaid, at the time of the committing of the felony and manslaughter aforesaid, in manner and form aforesaid, at the city and county aforesaid, were then and there wilfully and feloniously concerned in the commission of the same, and did then and there wilfully and feloniously aid and abet in the commission of the said felony and manslaughter.

And so the grand jury aforesaid do say that the said Charles A. Buddenseik, Charles Franck, Thomas W. Dailey and Robert V. Mackey, him, the said Louis Walters, in the manner and form aforesaid, and by the means aforesaid, wilfully and feloniously did kill and slay, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

### RANDOLPH B. MARTINE,

District Attorney.79

[79. People v. Buddensieck, 103 N. Y. 487, 9 N. E. 44, holding the above indictment sufficiently charged manslaughter in the second degree under secs. 193, 195 of New York Penal Code. Negligence in the construction of a building was alleged.]

### FORM 78.

#### Manslaughter.

KINGS COUNTY, SS.:

The jurors of the people of the State of New York, in and for the body of the county of Kings, upon their oath present: That Jeremiah Butler, of

the city of Brooklyn, in said county, on the sixth day of June, in the year one thousand eight hundred and fifty-six, at the city and in the county aforesaid, in and upon one Catharine Butler, in the peace of God and of the said people, then and there being, feloniously and wilfully did make an assault, and that the said Jeremiah Butler then and there, with the hands and feet of him, the said Jeremiah Butler, her, the said Catharine Butler, in and upon the head, neck, arms, body and vital parts of her, the said Catharine Butler, feloniously and wilfully did strike, beat and kick, giving her, the said Catharine Butler, by such striking, beating and kicking as aforesaid, divers mortal wounds, bruises and contusions in and upon the head, body and vital parts of her, the said Catharine Butler, of which mortal wounds, bruises and contusions she, the said Catharine Butler, from the sixth day of June, in the year aforesaid, until the seventh day of June, in the same year, at the city and in the county aforesaid, did languish, and languishing, did live; on which last mentioned day, in the year aforesaid, the said Catharine Butler, at the city and in the county aforesaid, of the mortal wounds, bruises and contusions aforesaid, did die.

And so the jurors aforesaid, upon their oaths aforesaid, do say, that he, the said Jeremiah Butler, her, the said Catharine Butler, in the manner and by the means aforesaid, feloniously and wilfully did kill and slay, against the peace of the people of the State of New York, and their dignity.

R. C. UNDERHILL,

District Attorney.80

[80. People v. Butler, 3 Park. Cr. R. (N. Y.) 377, 378. Common law form for manslaughter without designating any facts to show the degree under the statute. It was held that under an indictment in the above form the accused may be convicted of manslaughter as defined by the statutes, in any degree, according to the evidence.]

# FORM 79.

### Manslaughter.

THE STATE OF OHIO, BROWN COUNTY, SS..

The Court of Common Pleas, Brown county, Ohio, in the year of our Lord one thousand eight hundred and seventy-three.

The jurors of the grand jury of the State of Ohio, impaneled, sworn and charged to inquire of offenses committed within the said county of Brown, in the name and by the authority of the State of Ohio, on their oaths do present and find that William B. Barker, late of said county, on the 21st day of March, in the year of our Lord 1872, in the county of Brown aforesaid, unlawfully and feloniously, but without malice, did kill and slay one Sarah Lyda, then and there being, while he, the said William B. Barker, was then and there in the commission of an unlawful act, to wit, the unlawful act of

using and employing, in and upon the vagina and womb of the said Sarah Lyda, she, the said Sarah Lyda, being then and there a woman pregnant with the vitalized embryo of a child, a certain hard and pointed instrument, the name, size and description of which is to the jurors aforesaid unknown, and then and there administering to the said Sarah Lyda, she, the said Sarah Lyda, being a woman, pregnant as aforesaid, one ounce of a certain poisonous drug called ergot, with intent, by the use and employment of said instrument, and by the administration of said poisonous drug as aforesaid, to destroy said vitalized embryo of a child, and to cause an abortion thereof, the use and employment of which instrument and the administering of which poisonous drug, as aforesaid, not then and there being necessary to preserve the life of the said Sarah Lyda, and not having been advised by two physicians to be necessary for that purpose, contrary to the forms of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

W. JESSE THOMPSON,

Prosecuting Attorney of Brown County, Ohio.81

[81. State v. Barker, 28 Ohio St. 583, 584.]

### FORM 80.

# Mayhem.

The grand jurors, for the State of Tennessee, elected, empanelled, sworn and charged to enquire for the body of the county of Giles, aforesaid, upon their oath aforesaid present that Gabriel Worley, of said county, yeoman, on the first day of June, in the year of our Lord one thousand eight hundred and forty-eight, with force and arms, in the county of Giles, aforesaid, in and upon one certain negro man slave named Josiah, in the peace of God, and of the State, then and there being, feloniously, unlawfully, maliciously and of his malice aforethought, did make an assault and with a certain razor of the value of twenty-five cents, which he, the said Gabriel Wooley, in his right hand, then and there had and held, then and there feloniously, unlawfully, maliciously and of his malice aforethought, did strike, cut off and disable the organs of generation of him, the said slave Josiah, thereby, then and there, by the cutting and striking with the razor aforesaid, in manner and form aforesaid, the said slave Josiah was maimed and disabled, to the great damage of him, the said slave Josiah, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Gabriel Worley afterwards, to wit, on the said first day of June, in the year of our Lord one thousand eight hundred and fortyeight, with force and arms, in the county of Giles aforesaid, in and upon a certain other negro man slave named Josiah, in the peace of God, and of the

State, then and there being, feloniously, unlawfully, maliciously and of his malice aforethought, did make an assault, and with a certain sharp instrument, then and there feloniously, unlawfully, maliciously and of his malice aforethought, did strike, cut off and disable a part of the organs of generation of him the said last mentioned slave Josiah, thereby, then and there maining and disabling him the said last mentioned slave Josiah, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Gabriel Worley afterwards, to wit: on the first day of June in the year of our Lord one thousand and eight hundred and forty-eight, with force and arms, in the county of Giles aforesaid, in and upon a certain other negro man slave named Josiah, in the peace of God, and of the State, then and there being, feloniously, unlawfully, maliciously and of his malice aforethought, did make an assault, and with a certain sharp instrument, then and there feloniously, unlawfully and maliciously, and of his malice aforethought, did strike, cut and castrate him the said last mentioned slave Josiah, thereby then and there maining him the said last mentioned slave Josiah, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.82

[82. Wooley v. State, 11 Humph. (Tenn.) 172. This indictment was under a statute providing that no person shall maliciously and unlawfully by cutting, or otherwise, cut off, or disable the organs of generation of another, or any part thereof.]

#### FORM 81.

### Medical Attendance-Omission to Supply.

COUNTY COURT, COUNTY OF WESTCHESTER.

The People of the State of New York against J. Luther Pierson.

The grand jury of the county of Westchester, by this indictment, accuses J. Luther Pierson of the crime of wilfully, maliciously and unlawfully violating the provisions of subdivision one of section two hundred eighty-eight of the Penal Code of the State of New York, committed as follows:

That the said J. Luther Pierson, late of the town of Mt. Pleasant, in the county of Westchester and State of New York, on the fifteenth day of February, in the year one thousand nine hundred and one, with force and arms, at the town of Mt. Pleasant, in said county, did wilfully, maliciously and unlawfully omit, without lawful excuse, to perform a duty imposed upon him by law to furnish medical attendance for his said (J. Luther Pierson's) female minor child, under the age of two years, the said minor being then and there ill and suffering from catarrhal pneumonia, and he, the said J. Luther Pierson, then and there wilfully, maliciously and unlawfully neglecting and refusing to allow said minor to be attended and prescribed for by a regu-

larly licensed and practicing physician and surgeon, contrary to the form of the statute in such case made and provided.

GEORGE C. ANDREWS,

District Attorney of the County of Westchester.83

[83. In People v. Pierson, 176 N. Y. 201, 68 N. E. 243, a judgment of conviction on the above indictment was affirmed. The indictment was under \$ 288 of New York Penal Code, providing that "a person who, l, wilfully omits without lawful excuse to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor . . . or, 4, neglects, refuses, or omits to comply with any provision of this section . . . is guilty of a misdemeanor." And it was held that the indictment was not bad because it did not allege that the case was one in which a regularly licensed and practicing physician should have been called, as that was necessarily implied from the language used.]

### FORM 82.

#### Murder.

STATE OF ALABAMA, PLAINTIFF, DALLAS COUNTY.

The grand jury of said Dallas county, charge that on the 14th day of February, 1853, Joseph Noles, unlawfully, and with malice aforethought, killed George T. Sharp, by shooting him with a gun, against the peace and dignity of the State of Alabama.

(Signed)

J. A. STALLWORTH,

Solicitor for the Second Judicial Circuit of Alabama.84

[84. Noles v. State, 24 Ala. 672, wherein the above indictment was held sufficient under the code though it omitted many averments which were necessary at common law.]

# FORM 83.

#### Murder.

The People of the State of California v. William Judd, Eli Judd and —— Walker—State of California.

In the Court of Sessions of the county of Del Norte—Special Term, A. D. 1858—The grand jury of the county of Del Norte, by this indictment, accuse William Judd, Eli Judd and —— Walker, the defendants, of the crime of murder, committed as follows:

The said William Judd, Eli Judd and — Walker, on the second day of September, A. D. 1857, at the county of Del Norte, and State aforesaid, near the public house known as "Elk Camp," on the trail leading from the town of Crescent City to Sailor Diggings, did unlawfully, feloniously, and with malice

aforethought, kill and murder one Max Rothenheim, by shooting and wounding him, the said Rothenheim, through the body with a leaden bullet discharged from a rifle-gun, which gun was then and there in the hands of the said William Judd, and maliciously, feloniously and wilfully fired at the said Max Rothenheim, by him, the said William Judd, and wounding him the said Max Rothenheim, as aforesaid, of which wound he then and there died; and the said Eli Judd and —— Walker were then and there present, aiding, abetting and assisting the said William Judd in the perpetration of said murder—all of which was done in violation of the law of the land, and against the peace and dignity of the people of the State of California.

J. P. HAYNES,

District Attorney Del Norte Co.85

[85. People v. Judd, 10 Cal. 313, holding that it was not necessary to state in the indictment on what part of the body of the deceased the wound was inflicted and that the indictment contained a sufficient statement that the wound was mortal.]

# FORM 84.

#### Murder.

"The grand jurors of Sullivan county, in the State of Indiana, good and lawful men, duly and legally empanelled, charged and sworn to inquire into felonies and certain misdemeanors, in and for the body of said county of Sullivan, in the name and by the authority of the State of Indiana, on their oath present, that one Thomas Shepperd, late of said county, on the 10th day of June, A. D. 1875, in said county and State aforesaid, did then and there unlawfully and feloniously, purposely and with premeditated malice, kill and murder one Mason Engle, by then and there feloniously, purposely and with premeditated malice, shooting at and against, and thereby mortally wounding the said Mason Engle, with a certain deadly weapon commonly called a revolver, then and there loaded with gunpowder and leaden ball, which said revolver he, the said Thomas Shepperd, then and there had and held in his hands, of which said mortal wound he, the said Mason Engle, then and there instantly died, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Indiana.86

[86. Shepperd v. State, 64 Ind. 43.]

# FORM 85.

#### Murder.

The grand jurors for the county of Marion, and State of Indiana, upon their oath present, that John Kennedy, on the 16th day of October, A. D.

1876, at and in the county of Marion, and State aforesaid, did then and there unlawfully, wilfully, feloniously, purposely and with premeditated malice, in and upon one Clarence Hensley make an assault; and that the said John Kennedy, a certain pistol then and there charged with gunpowder and one leaden bullet, then and there wilfully, unlawfully, feloniously, purposely and with premeditated malice, did discharge and shoot off, to, against and upon the body of the said Clarence Hansley; and that the said John Kennedy with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by the force of the gunpowder aforesaid, by the said John Kennedy discharged and shot off, as aforesaid, then and there unlawfully, feloniously, wilfully, purposely and with premeditated malice, did strike, penetrate and wound the said Clarence Hensley in and upon the breast of the said Clarence Hensley, giving to the said Clarence Hensley, then and there, with the leaden bullet aforesaid, from the pistol charged and shot off as aforesaid, by the said John Kennedy, in and upon the breast of the said Clarence Hensley, one mortal wound, of the depth of six inches and of the breadth of one-quarter of an inch, of which said mortal wound the said Clarence Hensley then and there died.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Frank Kennedy, the said Clarence Hensley, in the manner and by the means aforesaid, unlawfully, feloniously, wilfully and purposely and with premeditated malice, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.<sup>87</sup>

[87. Kennedy v. State, 62 Ind. 136, 137.]

#### FORM 86.

#### Murder.

IN THE DISTRICT COURT OF JACKSON Co., STATE OF IOWA.

The State of Iowa vs. Samuel P. Watkins, Calvin Nelson and John B. Bucklin.

The grand jury of the county of Jackson aforesaid, in the name and by the authority of the State of Iowa, accuse Samuel P. Watkins, Calvin Nelson and John B. Bucklin of the crime of murder, perpetrated and committed as follows:

1. The said Samuel P. Watkins, John B. Bucklin and Calvin Nelson, on the 23d day of January, in the year of our Lord one thousand eight hundred and sixty-seven, in the county aforesaid, in and upon one Samuel S. Cronk, in the peace then and there being, feloniously, wilfully, premeditatedly and of their malice aforethought, did make an assault; and the said Samuel P. Watkins, Calvin Nelson and John B. Bucklin, with a certain piece of iron called a

part of a clevis, of about the length of twelve inches, and the width of one inch, and with one oak stick of wood of the length of eighteen inches and of the thickness of two inches, which they then and there in their hands had, and him, the said Samuel S. Cronk, then and there feloniously, wilfully, deliberately, premeditatedly and of their malice aforethought, divers times did strike and beat, giving to him, the said Samuel S. Cronk, by striking and beating him, as last aforesaid, with said piece of iron and said stick of wood, several mortal strokes, wounds and bruises in and upon the head of him, the said Samuel S. Cronk, to wit: One mortal wound on the forehead of him, the said S. S. Cronk; one mortal wound on the back and side of the head of him, the said Cronk, and one mortal wound extending from the side of the head to the back of the head of him, the said Cronk, of which said mortal strokes, wounds and bruises, he, the said Cronk, afterward, to wit, on the day and year aforesaid, at and in the county of Jackson, died.

2. And the grand jury aforesaid, in the name and by the authority of the State of Iowa, do further find and present, that the said Samuel P. Watkins, Calvin Nelson and John B. Bucklin, on the 23d day of January, A. D. 1867, in the county of Jackson, in the State of Iowa, in and upon one Samuel S. Cronk, in the peace then and there being, feloniusly, wilfully, deliberately, premeditatedly and of their malice aforethought, did make an assault; and with a part of an iron clevis, and with a stick of wood, and with a knife, did then and there strike, beat, bruise, cut and wound him, the said Cronk, in and upon his head and other parts of his body, and by means aforesaid, the said Samuel P. Watkins, Calvin Nelson and John B. Bucklin did, then and there, him, the said Samuel S. Cronk, kill and murder. And so the grand jury aforesaid do say that the said Samuel P. Watkins, Calvin Nelson and John B. Bucklin, him, the said Samuel S. Cronk, in the manner and by the means aforesaid, feloniously, wilfully, deliberately, premeditatedly and of their malice aforethought, did kill and murder, contrary to the laws of Iowa, in such cases made and provided, and against the peace and dignity of the State of Iowa.88

[88. State v. Watkins, 27 Iowa, 415, holding that the above form was not a good indictment for murder in the first degree under the statute but was good for murder in the second degree, and that the defendant could be tried thereon for that offense.]

# FORM 87.

#### Murder.

THE STATE OF MARYLAND, Carroll County, to wit:

The grand jurors of the State of Maryland, for the body Carroll county, do on their oaths present, that Joseph Davis, late of Carroll county aforesaid,

Yeoman, on the fifth day of April in the year of our Lord one thousand eight hundred and seventy-two, with force and arms, at the county aforesaid, in and upon one Abraham L. Lynn, in the peace of God, and of the said State, then and there being, feloniously, wilfully and of his malice aforethought did make an assault, and that the said Joseph Davis, with a certain iron crowbar, in and about three feet in length and one inch in diameter, which he, the said Joseph Davis, then and there had and held in both of his hands, the said Abraham L. Lynn, in and upon the back part of the head of him, the said Abraham L. Lynn, then and there feloniously, wilfully and of his malice aforethought, did strike, giving unto him, the said Abraham L. Lynn, then and there, with the said iron crowbar, by the stroke aforesaid, in manner aforesaid, in and upon the back part of the head of him, the said Abraham L. Lynn, one mortal wound, of the length of one and a half inches, and of the width of one and a quarter inches, and of the depth of one-eighth of an inch, of which said mortal wound he, the said Abraham L. Lynn, on the fifth day of April, in the year of our Lord one thousand eight hundred and seventy-two, at the county aforesaid, did languish, and languishing did live. On which same fifth day of April, in the year of our Lord one thousand eight hundred and seventy-two aforesaid, at the county aforesaid, he, the said Abraham L. Lynn, of the said mortal wound, died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Joseph Davis, him, the said Abraham L. Lynn, in manner and form aforesaid, and by the means aforesaid, feloniously, wilfully and of his malice aforethought did kill and murder, contrary to the Act of Assembly in such case made and provided, and against the peace, government and dignity of State.89

[89. Davis v. State, 39 Md. 355, holding that in an indictment for murder the circumstances which determine the degree need not be averred; that where one is indicted for murder in the technical language of the common law he is charged with a crime which includes all circumstances of aggravation, and is liable to be convicted of the inferior as well as the higher grades; and that an indictment which is founded upon a statute which creates, or increases the punishment for, an offense should aver the circumstances constituting the offense or which increase the punishment.]

#### **FORM 88.**

#### Murder.

In the District Court of the First Judicial District of the State of Nevada, Lyon county, United States of America. State of Nevada, county of Lyon. The State of Nevada, plaintiff, against Adamo Buralli, defendant. At a term of said District Court held at the court house in the town of Dayton, Lyon county, State of Nevada, on the thirteenth day of November, A. D. one thousand nine hundred and two, and continuing in session at the time

of finding this indictment. Present, the Honorable C. E. Mack, District Judge. Adamo Buralli is accused by the grand jury of the county of Lyon, State of Nevada, by this indictment, of the crime of murder, committed as follows, to wit: That the said Adamo Buralli on or about the third day of November, A. D. one thousand nine hundred and two, and before the finding of this indictment, at the town of Dayton, in the county of Lyon, State of Nevada, without authority of law, and with malice aforethought, he the said Adamo Buralli, being then and there armed with a deadly weapon, to wit, a pistol loaded with powder and leaden bullets, did then and there, without authority of law, and with malice aforethought, kill one Angelo Zari, a human being, by shooting him, the said Angelo Zari, with said pistol, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of Nevada. John Lothrop, District Attorney, in and for Lyon county, State of Nevada.

[90. State v. Buralli, 27 Nev. 41, 45. In this case the court said in reference to the objections to the sufficiency of the indictment that if it were not sufficient at common law the statutory provisions would control and cure the slight irregularities to which objection was urged, the ancient rules relative to the strictness to be observed in the language of indictments having been superseded by the wise and liberal provisions of the codes. Nev. Comp. Laws, §§ 4199, 4208-4210.]

# FORM 89.

### Murder.

UNITED STATES OF AMERICA, STATE OF NEVADA, COUNTY OF STOREY-INDICT-

In the District Court of the First Judicial District.

At a term begun and holden at the court house in Storey county, on the first Monday of June, in the year of our Lord one thousand eight hundred and sixty-seven, and continuing in session at the time of finding this indictment. Present, Hon. Richard Rising, presiding judge. The State of Nevada, plaintiff, v. John Millain, defendant.

Defendant, John Millain, above named, is accused by the grand jury of Storey county of the crime of murder, committed as follows:

The said John Millain, on the 20th day of January, 1867, murdered Julia Bulette, of the city of Virginia, in Storey county, in the State of Nevada, by striking her with a stick and choking her with his hands."91

[91. State v. Millain, 3 Nev. 409, 437, holding above form sufficient under following statute:

"It (meaning indictment) may be be substantially in the following form: "State of Nevada, County of ———, the State of Nevada, plaintiff, against A. B., defendant (or John Doe, whose real name is unknown, defendant), A. B.,

above named is accused by the grand jury of the county of ——— of a felony

(or if of the crime of murder, etc.), committed as follows:

"The said A. B., on the —— day of ———, A. D. 18—, or thereabouts, without authority of law, and with malice aforethought, killed Richard Roe, by shooting him with a pistol (or with a gun or other weapon, according to the facts).

The indictment must be direct, and contain as it regards: First, the party charged; Second, the offense charged; Third, the particular facts of the offense charged (so far as necessary to state a complete offense, but the evidence tending to prove the charge need not be stated. It shall not be necessary to set forth in the indictment the character of the weapon used, nor that any weapon was used in the commission of the offense, unless using such weapon is a necessary ingredient in the commission of the offense.

No indictment shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matters of form, which shall not tend to the prejudice of the

defendant."

# FORM 90.

#### Murder.

Territory of New Mexico, county of Santa Fe. In the District Court, at the Special Term, A. D. 1895. The grand jurors for the Territory of New Mexico, taken from the body of the good and lawful men of the county of Santa Fe aforesaid, duly elected, impanelled, sworn and charged at the term aforesaid to inquire in and for the county of Santa Fe aforesaid, upon their oaths do present, that Jesus Vialpando and Feliciano Chavez, late of the county of Santa Fe, Territory of New Mexico, on the twentieth day of January, in the year of our Lord, 1895, at the county of Santa Fe aforesaid. with force and arms, at the county aforesaid, in and upon one Tomas Martinez, then and there being, feloniously, unlawfully, wilfully, purposely, and with express malice aforethought, did make an assault, and the said Jesus Vialpando and Feliciano Chavez, certain guns and pistols then and there being. charged with gunpowder and loaded with divers leaden bullets, which said guns and pistols the said Jesus Vialpando and Feliciano Chavez in their right hands then and there held, against, at, and upon him, the said Tomas Martinez, then and there, feloniously, unlawfully, wilfully, purposely, and with express malice aforethought, did discharge and shoot off; and that the said Jesus Vialpando and Feliciano Chavez, with the leaden bullets aforesaid, by force of the gunpowder out of the said guns and pistols by them, the said Jesus Vialpando and Feliciano Chavez, so as aforesaid discharged and shot off, him, the said Tomas Martinez, in and upon the left side of the head of him, the said Tomas Martinez, then and there feloniously, unlawfully, wilfully, purposely, and with express malice aforethought, did strike and wound, giving to him, the said Tomas Martinez, then and there, with the leaden bullets aforesaid, out of the guns and pistols so as aforesaid dis-

charged and shot off in and upon the left side of the head of him, the said Tomas Martinez, one mortal wound, of which said mortal wound the said Tomas Martinez, then and there instantly died; and that the said Jesus Vialpando and Feliciano Chavez, then and there, feloniously, unlawfully, wilfully, purposely and with express malice aforethought, did take the said Tomas Martinz into both the hands of them, said Jesus Vialpando and Feliciano Chavez, and did then and there, feloniously, unlawfully, wilfully, purposely and with express malice aforethought, cast, throw, and push the said Tomas Martinez into a certain fire then and there burning, wherein there was a great quantity of wood, set fire to and caused to be burned and consumed by them, the said Jesus Vialpando and Feliciano Chavez, inflicting thereby, and by means of the flames thereof, upon the said Tomas Martinez, on his breast, belly, arms, legs, head, neck, and other parts of the body, divers mortal burns, sores and wounds, of which said mortal burns, sores and wounds the said Tomas Martinez then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Jesus Vialpando and Feliciano Chavez, the said Tomas Martinez, in manner and form aforesaid, feloniously, unlawfully, wilfully, purposely, and with express malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the Territory of New Merico.

#### J. H. CRIST,

District Attorney for Counties of Santa Fe, San Juan and Rio Arriba.92

[92. Territory v. Vialpando, 8 N. M. 211, 216, holding the above form sufficient to charge murder in the first degree under a statute declaring that all murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any kind of wilful, deliberate, and premeditated killing, etc., shall be deemed murder in the first degree and that it was not necessary to use the words "deliberate and premeditated."]

# FORM 91.

#### Murder.

TERRITORY OF NEW MEXICO, COUNTY OF SANTA FE, SS.:

In the District Court for the First Judicial District for the Territory of New Mexico, held for the county of Santa Fe, in said district, of September term, A. D. 1856, the grand jury for said Territory of New Mexico, duly impanelled and sworn for the body of the county of Santa Fe aforesaid, upon their oaths do present, that Esteban Tenorio, late of said county of Santa Fe, on the fourteenth day of September, A. D. 1856, in the county of Santa Fe aforesaid, with force and arms, in and upon the body of one Ramon Rodrignez, feloniously, wilfully and of his malice aforethought, did make an assault, and that the said Esteban Tenorio, with a certain knife of the value

of twenty-five cents, which the said Esteban Tenorio in his right hand then and there held, in and upon the left side of the head, near the left temple of the said Ramon Rodrignez, feloniously, wilfully and of his malice aforethought, did strike, thrust and penetrate, giving to the said Ramon Rodrignez, then and there, with the knife aforesaid, in and upon the left side of the head, near the temple of the said Ramon Rodrignez, one mortal wound of the breadth of three inches, of the width of sixth inches, and of the depth of three inches, of which said mortal wound the said Ramon Rodrignez, from the said fourteenth day of September, in the year aforesaid, until the eighteenth day of the month of September, in the year aforesaid, did languish, and languishing did live; on which eighteenth day of September, in the year aforesaid the said Ramon Rodrignez, at the county aforesaid, of the said mortal wound did die.

And so the jurors aforesaid, upon their oaths aforesaid do say that the said Esteban Tenorio, him the said Ramon Rodrignez, in the manner and by the means aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, against the peace and dignity of said territory, and against the form of the statute in such cases made and provided.

(Signed) WHEATON, for the Territory.93

[93. Tenorio v. Territory, 1 New Mexico, 279, holding that in an indictment for murder it need not be alleged that the weapon used was a "deadly" or "dangerous" weapon except in a case where the defendant is charged with murder under that part of the statute which changes the common law definition of murder, for murder in the fifth degree and in which these words are used in defining the crime, in which case the statute must be followed.]

# FORM 92.

#### Murder.

ST. LAWRENCE COUNTY, SS.:

I. The jurors of the people of the State of New York, in and for the body of the county of St. Lawrence, to wit: Harlow Godard, Schuyler Briggs, William Furness, Adam Pike, Lewis Bartholomew, John Hay, H. F. Taylor, Isaac Sheldon, Joseph B. Ellsworth, Charles J. Gillett, Joseph Frith, Andrew Dalzell, George Woodbridge, James F. Brownell, George Forsythe, Sylvanus Ellis, Charles Galloway, Thomas Stocker, good and lawful men of said county, now here sworn and charged to inquire for the said people in and for the body of said county, upon their oath do present that Peter La Beau, late of the town of Oswegatchie, in the county of St. Lawrence, theretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and sixty-four, with force of arms, etc., at the town of Oswegatchie, in the said county of St. Lawrence, in and upon one Julius Denny then and there being, feloniously did make an assault and unto him said Denny, a

deadly poison, to the jury unknown, did then and there administer with intent him, said Denny, then and there feloniously to kill, and which said poison by the administering aforesaid was then and there actually taken by the said Denny, against the form of the statute in such case made and provided.

II. And the jurors aforesaid, upon their oaths aforesaid, do further present, that Peter La Beau, heretofore, to wit, on the first day of October in the year one thousand eight hundred and sixty-four, at the town of Oswegatchie, in said county, in and upon one Julius Denny, then and there being, feloniously did make an assault, and unto him, said Denny, one ounce of deadly poison, commonly called and known as strychnia, did then and there administer, with intent him, said Denny, then and there feloniously to kill and murder, and which said poison, by the administering aforesaid, was by the said Denny then and there actually taken, against the form of the statute in such case made and provided.

III. And the jurors aforesaid, upon their oath aforesaid, do further present, that Peter La Beau, heretofore, to wit, on the first day of October, in the year one thousand eight hundred and sixty-four, at the town of Oswegatchie, in said county, in and upon one Julius Denny, then and there being, did feloniously make an assault and unto him, said Denny, one ounce of deadly poison, commonly called and known as strychnia, did then and there cause and procure to be administered, with intent him, said Denny, then and there feloniously to kill, and which said poison by the causing and procuring to be administered as aforesaid, was by the said Denny then and there actually taken, against the form of the statute in such case made and provided.

IV. And the jurors aforesaid, upon their oath aforesaid, do further present, that Peter La Beau, heretofore, to wit, on the first day of October, in the year one thousand eight hundred and sixty-four, at the town of Oswegatchie, in said county, in and upon one Julius Denny, then and there being, did feloniously make an assault and unto him, said Denny, fifteen grains of poison, known as strychnia, did then and there administer, and did then and there cause and procure to be administered, with intent him, said Denny, then and there feloniously to kill, by then and there mingling, and then and there causing and procuring said poison to be mingled with the food of him, said Denny, and which said poison, by means of the mingling with the food, as aforesaid, and by means of the causing and procuring to be mingled with the food, as aforesaid, was by the said Denny then and there actually taken, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York.

B. H. VARY, District Attorney.94

[94. La Beau v. People, 6 Park. Cr. R. (N. Y.) 371. Form used in this case for murder by poisoning.]

# FORM 93.

# Murder by Poison.

COURT OF GENERAL SESSIONS OF THE PEACE, Of the City and County of New York.

The People of the State of New York against Robert W. Buchanan.

The grand jury of the city and county of New York, by this indictment, accuse Robert W. Buchanan of the crime of murder in the first degree, committed as follows:

The said Robert W. Buchanan, late of the city of New York, in the county of New York, aforesaid, on the twenty-second day of April, in the year of our Lord one thousand eight hundred and ninety-two, at the city and county aforesaid, contriving and intending wilfully, feloniously and of his malice aforethought one Anna Buchanan, with poison, to kill and murder, in and upon her the said Anna Buchanan, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault, and a large quantity, to wit, five grains weight of a certain deadly poison called morphine, then and there wilfully, feloniously and of his malice aforethought, did give and administer unto the said Anna Buchanan, with intent that she should take and swallow the same down into her body, he the said Robert W. Buchanan then and there well knowing the said morphine to be a deadly poison; and the said Anna Buchanan, the said morphine, so given and administered unto her by the said Robert W. Buchanan as aforesaid, did then and there take and swallow down into her body; by reason and by means of which said taking and swallowing down the said morphine into her body as aforesaid, she the said Anna Buchanan then and there became and was mortally sick and distempered in her body, and of the said mortal sickness and distemper, from the said twenty-second day of April, in the year aforesaid, until the twenty-third day of April in the same year aforesaid, at the city and county aforesaid, did languish, and languishing did live, on which said twentythird day of April, in the year aforesaid, she, the said Anna Buchanan, at the city and county aforesaid, of the said mortal sickness and distemper died.

And so the grand jury aforesaid do say, that the said Robert W. Buchanan, her the said Anna Buchanan, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and of his malice aforethought, did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

Second Count.

And the grand jury aforesaid by this indictment further accuse the said Robert W. Buchanan of the same crime of murder in the first degree, committed as follows:

The said Robert W. Buchanan, late of the city and county aforesaid, after-

wards, to wit, on the said twenty-second day of April, in the year of our Lord one thousand eight hundred and ninety-two, at the city and county aforesaid, contriving and intending wilfully, feloniously and of his malice aforethought, one Anna Buchanan with poison, to kill and murder, in and upon her, the said Anna Buchanan, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought did make an assault, and a quantity of a certain deadly poison to the grand jury aforesaid unknown then and there wilfully, feloniously and of his malice aforethought did give and administer unto the said Anna Buchanan, with intent that she should take and swallow the same down into her body, he, the said Robert W. Buchanan, then and there well knowing the same to be a deadly poison; and the said Anna Buchanan, the said deadly poison, so given and administered unto her by the said Robert W. Buchanan as aforesaid, did then and there take and swallow down into her body, by reason and by means of which said taking and swallowing down the said deadly poison into her body as aforesaid, she, the said Anna Buchanan, then and there became and was mortally sick and distempered in her body, and of the said mortal sickness and distemper, from the said twenty-second day of April, in the year aforesaid, until the twenty-third day of April, in the same year aforesaid, at the city and county aforesaid, did languish, and languishing did live, on which said twenty-third day of April, in the year aforesaid, she the said Anna Buchanan, in the city and county aforesaid, of the said mortal sickness and distemper, died.

And so the grand jury aforesaid do say, that the said Robert W. Buchanan, her, the said Anna Buchanan, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and of his malice aforethought, did poison, kill and murder, against the form of the statute in such case made and provided and against the peace of the people of the State of New York, and their dignity.

#### DELANCEY NICOLL,

District Attorney.95

[95. In People v. Buchanan, 145 N. Y. 1, 39 N. E. 846, a judgment of conviction on the above indictment was affirmed.]

# FORM 94.

## Murder.

COURT OF GENERAL SESSIONS OF THE PEACE, In and for the County of New York.

The People of the State of New York against Raffaele Cascone and Domenico Cascone.

The grand jury of the county of New York, by this indictment, accused Raffaele Cascone and Domenico Cascone of the crime of murder in the first degree, committed as follows:

The said Raffaele Cascone and Domenico Cascone, both late of the Borough of Manhattan, of the city of New York, in the county of New York, aforesaid, on the ninth day of June, in the year of our Lord one thousand nine hundred and three, at the borough and county aforesaid, with force and arms, in and upon one Tirigi Sinischalchi, in the peace of the said people then and there being, wilfully, feloniously and of their malice aforethought, did make an assault, and a certain gun then and there charged and loaded with gunpowder and divers leaden bullets, which said gun they, the said Raffaele Cascone and Domenico Cascone, in their right hands then and there had and held. to. at, against and upon the said Tirigi Sinischalchi then and there wilfully, feloniously and of their malice aforethought did shoot off and discharge; and the said Raffaele Cascone and Domenico Cascone, with the leaden bullets aforesaid, out of the gun aforesaid, then and there by force of the gunpowder aforesaid, shot off, sent forth and discharged as aforesaid, him the said Tirigi Sinischalchi in and upon the head and body of him, the said Tirigi Sinischalchi, then and there wilfully, feloniously and of their malice aforethought, did strike, penetrate and wound, giving into him, the said Tirigi Sinischalchi, then and there with the leaden bullets aforesaid, so as aforesaid discharged, sent forth and shot out of the gun aforesaid, by the said Raffaele Cascone and Dominico Cascone, in and upon the head and body of him the said Tirigi Sinischalchi, divers mortal wounds, of which said mortal wounds he, the said Tirigi Sinischalchi, from the said ninth day of June, in the year aforesaid, until the twentieth day of June, in the same year aforesaid, at the borough and county aforesaid, did languish, and languishing did live, and on which said last mentioned day he, the said Tirigi Sinischalchi, at the borough and county aforesaid, of the said mortal wounds, did die.

And so the grand jury aforesaid do say that the said Raffaele Cascone and Domenico Cascone, him the said Tirigi Sinischalchi, in the manner and form and by the means aforesaid, wilfully, feloniously and of their malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

WILLIAM TRAVERSE JEROME,

District Attorney.96

[96. In People v. Cascone, 185 N. Y. 317, — N. E. —, a judgment of conviction on the above indictment was reversed but not on grounds affecting the sufficiency of the indictment.]

# FORM 95.

# Murder by Poison.

COURT OF GENERAL SESSIONS OF THE PEACE, Of the City and County of New York.

The People of the State of New York v. Carlyle W. Harris.

The grand jury of the city and county of New York, by this indictment, accuse Carlyle W. Harris of the crime of murder in the first degree, committed as follows:

The said Carlyle W. Harris, late of the city of New York, in the county of New York, aforesaid, on the thirty-first day of January, in the year of our Lord one thousand eight hundred and ninety-one, at the city and county aforesaid, contriving and intending wilfully, feloniously and of his malice aforethought, one Helen Mary Neilson Potts, with poison, to kill and murder, in and upon her the said Helen Mary Neilson Potts, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault, and a large quantity, to wit, five grains weight of a certain deadly poison called morphine then and there wilfully, feloniously and of his malice aforethought, did give and administer unto the said Helen Neilson Potts, with intent that she should take and swallow the same down into her body, he, the said Carlyle W. Harris, then and there well knowing the said morphine to be a deadly poison, and the said Helen Mary Neilson Potts, the said morphine, so given and administered unto her by the said Carlyle W. Harris as aforesaid, did then and there take and swallow down into her body, by reason and by means of which said taking and swallowing down the said morphine into her body as aforesaid, she, the said Helen Mary Neilson Potts, then and there became and was mortally sick and distempered in her body, and of the said mortal sickness and distemper, from the said thirty-first day of January in the year aforesaid, until the first day of February, in the same year aforesaid, at the city and county aforesaid, did languish, and languishing did live, on which said first day of February in the year aforesaid, she the said Helen Mary Neilson Potts, at the city and county aforesaid, of the said mortal sickness and distemper, died.

And so the grand jury aforesaid do say, that the said Carlyle W. Harris, her, the said Helen Mary Neilson Potts, in the manner and form aforesaid, and by the manner aforesaid, wilfully, feloniously and of his malice aforethought, did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

DELANCEY NICOLL, District Attorney.97

[97. In People v. Harris, 136 N. Y. 423, 33 N. E. 65, a judgment of conviction on the above indictment was affirmed.]

# FORM 96.

#### Murder.

COURT OF GENERAL SESSIONS OF THE PEACE, In and for the County of New York.

The People of the State of New York against Mike Brush, otherwise called Jacob Huter.

The grand jury of the county of New York, by this indictment accuse Mike Brush, otherwise called Jacob Huter, of the crime of murder in the first degree, committed as follows:

The said Mike Brush, otherwise called Jacob Huter, late of the Borough of Manhattan, of the city of New York, in the county of New York aforesaid, on the twentieth day of March, in the year of our Lord one thousand nine hundred and four, at the borough and county aforesaid, with force and arms, in and upon one Hugh J. Enright, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault, and a certain pistol then and there charged and loaded with gunpowder and one leaden bullet, which said pistol he, the said Mike Brush, otherwise called Jacob Huter, in his right hand then and there had and held, to, at, against and upon the said Hugh J. Enright then and there wilfully, feloniously and of his malice aforethought did shoot off and discharge, and the said Mike Brush, otherwise called Jacob Huter, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, shot off, sent forth and discharged as aforesaid, him, the said Hugh J. Enright, in and upon the belly of him, the said Hugh J. Enright, then and there wilfully, feloniously and of his malice aforethought, did strike, penetrate and wound, giving unto him, the said Hugh J. Enright, then and there with the leaden bullett aforesaid, so as aforesaid discharged, set forth and shot out of the pistol aforesaid, by the said Mike Brush, otherwise called Jacob Huter, in and upon the belly of him, the said Hugh J. Enright, one mortal wound of the breadth of one inch, and of the depth of six inches. of which said mortal wound he, the said Hugh J. Enright, did then and there die.

And so the grand jury aforesaid do say that the said Mike Brush, otherwise called Jacob Huter, him, the said Hugh J. Enright, in the manner and form and by the means aforesaid, wilfully, feloniously and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

WM. TRAVERS JEROME,

District Attorney.98

[98. Form used in People v. Huter, 184 N. Y. 237, 77 N. E. 6, in which independ of conviction was reversed on ground of error in charge to jury.]

# FORM 97.

### Murder by Poison.

COURT OF GENERAL SESSIONS OF THE PEACE In and for the City and County of New York.

The People of the State of New York against Roland Burnham Molineux.

The grand jury of the county of New York by this indictment, accuse Roland Burnham Molineux of the crime of murder in the first degree, committed as follows:

The said Roland Burnham Molineux, late of the borough of Manhattan of the city of New York, in the county of New York aforesaid, on the twentyeighth day of December, in the year one thousand eight hundred and ninetyeight, at the borough and county aforesaid, contriving and intending, wilfully, feloniously and of his malice aforethought one Katherine J. Adams with poison to kill and murder in and upon her, the said Katherine J. Adams, in the peace of the said people then and there being wilfully, feloniously and of his malice aforethought did make an assault, and a large quantity, to wit, twenty grains weight of a certain deadly poison called cyanide of mercury, then and there wilfully, feloniously and of his malice aforethought did give and administer unto the said Katherine J. Adams, with intent that she should take and swallow the same down into her body, he the said Roland Burnham Molineux, then and there well knowing the said cyanide of mercury to be a deadly poison; and the said Katherine J. Adams the said cyanide of mercury so given and administered unto her by the said Roland Burnham Molineux as aforesaid. did then and there take and swallow down into her body, by reason and by means of which said taking and swallowing down the said cyanide of mercury into her body as aforesaid, she, the said Katherine J. Adams, then and there became and was mortally sick and distempered in her body, and of which said mortal sickness and distemper she, the said Katherine J. Adams, did then and there die.

And so the grand jury aforesaid do say that the said Roland Burnham Molineux her, the said Katherine J. Adams, in the manner and form aforesaid and by the means aforesaid, wilfully, feloniously and of his malice aforethought did poison, kill and murder; against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

#### Second Count.

And the grand jury aforesaid, by this indictment, further accuse the said Roland Burnham Molineux of the same crime of murder in the first degree, committed as follows:

The said Roland Burnham Molineux, late of the borough of Manhattan of the city of New York, in the county of New York, aforesaid, on the twentyeighth day of December, in the year one thousand eight hundred and ninetyeight, at the borough and county aforesaid, wilfully, feloniously and with a

deliberate and premeditated design to effect the death of one Harry S. Cornish, in the peace of the said people then and there being, in and upon one Katherine J. Adams, in the peace of the said people then and there being, wilfully, feloniously and with a deliberate and premeditated design to effect the death of the said Harry S. Cornish, did make an assault, and a large quantity, to wit, twenty grains weight of a certain deadly poison called cyanide of mercury, did then and there wilfully, feloniously and with a deliberate and premeditated design to effect the death of the said Harry S. Cornish, give and administer unto the said Katherine J. Adams, he, the said Roland Burnham Molineux, then and there, well knowing the said cyanide of mercury to be a deadly poison; and the said Katherine J. Adams, the said cyanide of mercury so given and administered unto her by the said Roland Burnham Molineux, as aforesaid, did then and there take and swallow down into her body, by reason and by means of which said taking and swallowing down the said cyanide of mercury into her body, as aforesaid, she, the said Katherine J. Adams, then and there became and was mortally sick and distempered in her body, and of which said mortal sickness and distemper she, the said Katherine J. Adams, did then and there die.

And so the grand jury aforesaid do say, that the said Roland Burnham Molineux, her the said Katherine J. Adams, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and with the deliberate and premeditated design to effect the death of the said Harry S. Cornish aforesaid, did poison, kill, and murder; against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

#### Third Count.

And the grand jury aforesaid, by this indictment further accuse the said Roland Burnham Molineux of the said crime of murder in the first degree, committed as follows:

The said Roland Burnham Molineux, late of the borough of Manhattan of the city of New York, in the county of New York aforesaid, on the twenty-eighth day of December, in the year one thousand eight hundred and ninety-eight, at the borough and county aforesaid, in and upon one Katherine J. Adams, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault, and a large quantity, to wit, twenty grains weight of a certain deadly poison called cyanide of mercury, then and there wilfully, feloniously and of his malice aforethought did give and administer unto the said Katherine J. Adams, with intent that she should take and swallow the same down into her body, he, the said Roland Burnham Molineux, then and there well knowing the said cyanide of mercury to be a deadly poison, and the said Katherine J. Adams the said cyanide of mercury so given and administered unto her by the said Roland Burnham Molineux as aforesaid, did then and there take and swallow down into her body by reason and by means of which said taking and swallow-

ing down the said cyanide of mercury into her body as aforesaid, she, the said Katherine J. Adams, then and there became and was mortally sick and distempered in her body, and of which said mortal sickness and distemper she, the said Katherine J. Adams, did then and there die.

And so the grand jury aforesaid do say that the said Roland Burnham Molineux her, the said Katherine J. Adams, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and of his malice aforethought did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

#### Fourth Count.

And the grand jury aforesaid, by this indictment further accuse the said Roland Burnham Molineux, of the same crime of murder in the first degree, committed as follows:

The said Roland Burnham Molineux, late of the borough of Manhattan of the city of New York, in the county of New York aforesaid, on the twentyeighth day of December, in the year one thousand eight hundred and ninetyeight, of the borough and county aforesaid, contriving and intending, wilfully, feloniously and of his malice aforethought, one Katherine J. Adams, with poison to kill and murder, in and upon her, the said Katherine J. Adams, in the peace of the said people then and there being, did make an assault and then and there wilfully, feloniously and of his malice aforethought, did give and administer to and cause to be taken and swallowed by her, the said Katherine J. Adams, down into her body a large quantity, to wit, twenty grains weight of a certain deadly poison called cyanide of mercury, he, the said Roland Burnham Molineux, then and there well knowing the said cyanide of mercury to be a deadly poison, by reason and by means of which said giving, administering, taking and swallowing down the said cyanide of mercury into her body as aforesaid, she, the said Katherine J. Adams, then and there became and was mortally sick and distempered in her body and of which said mortal sickness and distemper she, the said Katherine J. Adams, did then and there die.

And so the grand jury aforesaid, do say that the said Roland Burnham Molineux, her, the said Katherine J. Adams, in the manner and form aforesaid and by the means aforesaid, wilfully, feloniously and of his malice aforethought did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

# Fifth Count.

And the grand jury aforesaid, by this indictment, further accuse the said Roland Burnham Molineux of the same crime of murder in the first degree, committed as follows:

The said Roland Burnham Molineux, late of the borough of Manhattan of the city of New York, in the county of New York aforesaid, on the twentyeighth day of December, in the year one thousand eight hundred and ninety-

eight, at the borough and county aforesaid, wilfully, feloniously and with a deliberate and premeditated design to effect the death of one Harry S. Cornish, in the peace of the said people then and there being, in and upon one Katherine J. Adams, in the peace of the said people then and there being, wilfully, feloniously and with a deliberate and premeditated design to effect the death of the said Harry S. Cornish, did make an assault, and then and there wilfully, feloniously and with a deliberate and premeditated design to effect the death of the said Harry S. Cornish, did give and administer to and cause to be taken and swallowed by her, the said Katherine J. Adams, down into her body, a large quantity, to wit, twenty grains weight of a certain deadly poison called cyanide of mercury, he, the said Roland Burnham Molineux, then and there well knowing the said cyanide of mercury to be a deadly poison, by reason and by means of which said giving, administering, taking and swallowing down the said cyanide of mercury into her body as aforesaid, she the said Catherine J. Adams, then and there became and was mortally sick and distempered in her body, and of which said mortal sickness and distemper she, the said Katherine J. Adams, did then and there die.

And so the grand jury aforesaid do say, that the said Roland Burnham Molineux, her, the said Katherine J. Adams, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and with the deliberate and premeditated design to effect the death of the said Harry S. Cornish aforesaid, did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

#### Sixth Count.

And the grand jury aforesaid, by this indictment, further accuse the said Roland Burnham Molineux of the same crime of murder in the first degree, committed as follows:

The said Roland Burnham Molineux, late of the borough of Manhattan of the city of New York, in the county of New York aforesaid, on the twentyeighth day of December, in the year one thousand eight hundred and ninetyeight, at the borough and county aforesaid, in and upon one Katherine J. Adams, in the peace of the said people then and there being, wilfully, felonjously and of his malice aforethought did make an assault and then and there wilfully, feloniously and of his malice aforethought, did give and administer to and cause to be taken and swallowed by her, the said Katherine J. Adams. down into her body a large quantity, to wit, twenty grains weight of a certain deadly poison called cyanide of mercury, he, the said Roland Burnham Molineux, then and there well knowing the said cyanide of mercury to be a deadly poison, by reason and by means of which said giving, administering, taking and swallowing down the said cyanide of mercury into her body as aforesaid she, the said Katherine J. Adams, then and there became and was mortally sick and distempered in her body, and of which said mortal sickness and distemper she, the said Katherine J. Adams, did then and there die.

And so the Grand jury aforesaid do say that the said Roland Burnham

Molineux her, the said Katherine J. Adams, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and of his malice aforethought, did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

ASA BIRD GARDINER,
District Attorney.99

[99. In People v. Molineux, 168 N. Y. 264, 61 N. E. 286, the above form was used. The judgment of conviction was reversed by the court of appeals on grounds not connected with the sufficiency of the indictment.]

## FORM 98.

## Murder—Charging Effecting Death of Deceased by Means of Poison Administered by an Accomplice.

COURT OF GENERAL SESSIONS OF THE PEACE In and for the County of New York.

The People of the State of New York against Albert T. Patrick.

The grand jury of the county of New York, by this indictment, accuse Albert T. Patrick of the crime of murder in the first degree, committed as follows:

The said Albert T. Patrick, late of the borough of Manhattan of the city of New York, in the county of New York aforesaid, on the twenty-third day of September, in the year of our Lord one thousand and nine hundred, at the borough, city and county aforesaid, contriving and intending, wilfully, feloniously and of his malice aforethought, one William Marsh Rice, with poison to kill and murder, in and upon him, the said William Marsh Rice, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault, and a quantity of a certain deadly poison called chloroform did then and there wilfully, feloniously and of his malice aforethought, give and administer unto him, the said William Marsh Rice, with the intent that he, the said William Marsh Rice, should take and receive the same, he, the said Albert T. Patrick, then and there well knowing the said chloroform to be a deadly poison; and the said William Marsh Rice the said chloroform so given and administered to him by the said Albert Patrick, as aforesaid, did take and receive, by reason and by means of which taking and receiving of the said chloroform, he, the said William Marsh Rice, then and there became and was mortally sick and distempered in his body, and of which said mortal sickness and distemper, he, the said William Marsh Rice, did then and there die.

And so the grand jury aforesaid, do say that the said Albert T. Patrick, him, the said William Marsh Rice, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and of his malice aforethought did

### Precedents of Forms.

poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

#### Second Count.

And the grand jury aforesaid, by this indictment, further accuse the said Albert T. Patrick of the same crime of murder in the first degree, committed as follows:

The said Albert T. Patrick, late of the borough of Manhattan, of the city of New York, in the county of New York, aforesaid, on the twenty-third day of September, in the year of our Lord one thousand and nine hundred, at the borough, city and county aforesaid, contriving and intending, wilfully, feloniously and of his malice aforethought, the said William Marsh Rice, with poison to kill and murder, in and upon him, the said William Marsh Rice, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault and a quantity of a certain deadly poison called chloroform, did then and there wilfully, feloniously and of his malice aforethought, give and administer unto him, the said William Marsh Rice, with the intent that he should take and receive the same, he, the said Albert T. Patrick, then and there well knowing the said chloroform to be a deadly poison; and he, the said William Marsh Rice, the said chloroform so given and administered unto him by the said Albert T. Patrick, as aforesaid, did then and there take and receive, by reason and by means of which taking and receiving of the said chloroform, as aforesaid, he, the said William Marsh Rice, did then and there die.

And so the grand jury aforesaid, do say that the said Albert T. Patrick him, the said William Marsh Rice, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and of his malice aforethought, did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

#### Third Count.

And the grand jury aforesaid, further accuse the said Albert T. Patrick of the same crime of murder in the first degree, committed as follows:

The said Albert T. Patrick, late of the borough of Manhattan of the city of New York, in the county of New York aforesaid, on the twenty-third day of September, in the year of our Lord one thousand and nine hundred, at the borough, city and county aforesaid, contriving and intending wilfully, feloniously and of his malice aforethought, one William Marsh Rice, with poison to kill and murder, in and upon him, the said William Marsh Rice, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault, and a quantity of a certain deadly poison called mercury, did then and there wilfully, feloniously and of his malice aforethought, give and administer unto him, the said William Marsh Rice, with the intent that he, the said William Marsh Rice, should take and receive the

same, and swallow the same down into his body, he, the said Albert T. Patrick, then and there well knowing the said mercury to be a deadly poison, and the said William Marsh Rice, the said mercury so given and administered to him by the said Albert T. Patrick, as aforesaid, did take and receive and swallow down into his body, by reason and by means of which taking and receiving and swallowing down into his body of the said mercury, he, the said William Marsh Rice, then and there became and was mortally sick and distempered in his body, and of which said mortal sickness and distemper he, the said William Marsh Rice, did then and there die.

And so the grand jury aforesaid, do say that the said Albert T. Patrick, him, the said William Marsh Rice, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and of his malice aforethought, wilfully, feloniously and of his malice aforethought did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

#### Fourth Count.

And the grand jury aforesaid, by this indictment, further accuse the said Albert T. Patrick of the same crime of murder in the first degree, committed as follows:

The said Albert T. Patrick, late of the borough of Manhattan of the city of New York, in the county of New York aforesaid, on the twenty-third day of September, in the year of our Lord one thousand and nine hundred, at the borough, city and county aforesaid, contriving and intending wilfully, feloniously and of his malice aforethought, the said William Marsh Rice, with poison to kill and murder, in and upon him, the said William Marsh Rice, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault and a quantity of a certain deadly poison called mercury, did then and there wilfully, feloniously and of his malice aforethought, give and administer unto him, the said William Marsh Rice, with the intent that he should take and receive the same and swallow the same down into his body, he, the said Albert T. Patrick, then and there well knowing the said mercury to be a deadly poison; and he, the said William Marsh Rice, the said mercury so given and administered unto him by the said Albert T. Patrick, as aforesaid, did then and there take and receive and swallow down into his body, by reason and by means of which said taking and receiving and swallowing down into his body of the said mercury, as aforesaid, he, the said William Marsh Rice, did then and there die.

And so the grand jury aforesaid do say that the said Albert T. Patrick, him, the said William Marsh Rice, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously, and of his malice aforethought, did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

# PRECEDENTS OF FORMS. Fifth Count.

And the grand jury aforesaid, by this indictment, further accuse the said Albert T. Patrick of the same crime of murder in the first degree, committed as follows:

The said Albert T. Patrick, late of the borough of Manhattan of the city of New York, in the county of New York, aforesaid, on the twenty-third day of September, in the year of our Lord one thousand and nine hundred, at the borough, city and county aforesaid, contriving and intending wilfully, feloniously and of his malice aforethought, one William Marsh Rice, with poison to kill and murder, in and upon him, the said William Marsh Rice, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault, and a quantity of certain deadly poisons called chloroform and mercury, did then and there wilfully, feloniously and of his malice aforethought, give and administer unto him, the said William Marsh Rice, with the intent that he, the said William Marsh Rice, should take and receive the same and swallow the same down into his body, he, the said Albert T. Patrick, then and there well knowing the said chloroform and mercury to be deadly poisons; and the said William Marsh Rice the said chloroform and mercury so given and administered to him by the said Albert T. Patrick, as aforesaid, did take and receive and swallow down into his body, by reason and by means of which said taking and receiving and swallowing down into his body of the said chloroform and mercury, he, the said William Marsh Rice, then and there became and was mortally sick and distempered in his body, and of which said mortal sickness and distemper he, the said William Marsh Rice, did then and there die.

And so the grand jury aforesaid do say that the said Albert T. Patrick, him, the said William Marsh Rice, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and of his malice aforethought, did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

#### Sixth Count.

And the grand jury aforesaid, by this indictment, further accuse the said Albert T. Patrick of the same crime of murder in the first degree, committed as follows:

The said Albert T. Patrick, late of the borough of Manhattan of the city of New York, in the county of New York aforesaid, on the twenty-third day of September, in the year of our Lord one thousand and nine hundred, at the borough, city and county aforesaid, contriving and intending wilfully, feloniously and of his malice aforethought, the said William Marsh Rice, with poison to kill and murder, in and upon him, the said William Marsh Rice, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault and a quantity of certain deadly poisons called chloroform and mercury, did then and there wilfully, feloniously and of his malice aforethought give and administer unto him, the said

William Marsh Rice, with the intent that he should take and receive and swallow the same down into his body, he, the said Albert T. Patrick, then and there well knowing the said chloroform and mercury to be deadly poisons, and he, the said William Marsh Rice, the said chloroform and mercury, so given and administered unto him by the said Albert T. Patrick, as aforesaid, did then and there take and receive and swallow down into his body, by reason and by means of which taking and receiving and swallowing down into his body of the said chloroform and mercury, he, the said William Marsh Rice, did then and there die.

And so the grand jury aforesaid do say, that the said Albert T. Patrick, him, the said William Marsh Rice, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and of his malice aforethought, did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

#### Seventh Count.

And the grand jury aforesaid, by this indictment, further accuse the said Albert T. Patrick of the same crime of murder in the first degree, committed as follows:

The said Albert T. Patrick, late of the borough of Manhattan, of the city of New York, in the county of New York, aforesaid, on the twenty-third day of September, in the year of our Lord one thousand and nine hundred, at the borough, city and county aforesaid, contriving and intending wilfully, felopiously and of his malice aforethought, one William Marsh Rice, with poison to kill and murder, in and upon him, the said William Marsh Rice, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault, and a quantity of a certain deadly poison (a more particular description of which is to the grand jury aforesaid unknown) did then and there wilfully, feloniously and of his malice aforethought, give and administer unto him, the said William Marsh Rice, with the intent that he, the said William Marsh Rice, should take and receive the same and swallow the same down into his body, he, the said Albert T. Patrick, then and there well knowing the said poison (a more particular description of which is to the grand jury aforesaid unknown) to be a deadly poison; and the said William Marsh Rice the said deadly poison, so given and administered to him by the said Albert T. Patrick, as aforesaid, did take and receive and swallow down into his body, by reason and by means of which taking and receiving and swallowing down into his body of the said deadly poison, he, the said William Marsh Rice, then and there became and was mortally sick and distempered in his body, and of which said mortal sickness and distemper, he, the said William Marsh Rice, did then and there

And so the grand jury aforesaid do say, that the said Albert T. Patrick, him, the said William Marsh Rice, in the manner and form aforesaid, and by

the means aforesaid, wilfully, feloniously and of his malice aforethought did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

# Eighth Count.

And the grand jury aforesaid, by this indictment, further accuse the said Albert T. Patrick of the same crime of murder in the first degree, committed as follows:

The said Albert T. Patrick, late of the borough of Manhattan of the city of New York, in the county of New York aforesaid, on the twenty-third day of September, in the year of our Lord one thousand and nine hundred, at the borough, city and county aforesaid, contriving and intending wilfully, feloniously and of his malice aforethought, the said William Marsh Rice, with poison to kill and murder, in and upon him, the said William Marsh Rice, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault, and a quantity of a certain deadly poison (a more particular description of which is to the grand jury aforesaid unknown) did then and there wilfully, feloniously and of his malice aforethought, give and administer unto him, the said William Marsh Rice, with the intent that he should take and receive the same and swallow the same down into his body, he the said Albert T. Patrick, then and there well knowing the said deadly poison (a more particular description of which is to the grand jury aforesaid unknown) to be a deadly poison; and he, the said William Marsh Rice, the said deadly poison (a more particular description of which is to the grand judy aforesaid unknown) so given and administered unto him by the said Albert T. Patrick, as aforesaid, did then and there take and receive and swallow down into his body, by reason and by means of which taking and receiving and swallowing down into his body of the said deadly poison, as aforesaid, he, the said William Marsh Rice, did then and there die.

And so the grand jury aforesaid do say, that the said Albert T. Patrick, him, the said William Marsh Rice, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and of his malice aforethought, did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

#### Ninth Count.

And the grand jury aforesaid, by this indictment, further accuse the said Albert T. Patrick of the same crime of murder in the first degree, committed as follows:

The said Albert T. Patrick, late of the borough of Manhattan of the city of New York, in the county of New York aforesaid, on the twenty-third day of September, in the year of our Lord one thousand and nine hundred, at the borough, city and county aforesaid, contriving and intending, wilfully, felo-

niously and of his malice aforethought, one William Marsh Rice, with poison to kill and murder, in and upon him, the said William Marsh Rice, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault, and a quantity of a certain deadly poison called chloroform, and of a certain deadly poison called mercury, and of certain deadly poisons (a more particular description of which is to the grand jury aforesaid unknown) did then and there wilfully, feloniously and of his malice aforethought, give and administer unto him, the said William Marsh Rice, with the intent that he, the said William Marsh Rice, should take and receive the same and swallow the same down into his body, he, the said Albert T. Patrick, then and there well knowing the said chloroform and mercury, and the said deadly poisons (a more particular description of which is to the grand jury aforesaid unknown) to be deadly poisons; and the said William Marsh Rice the said chloroform and mercury, and the said deadly poisons (a more particular description of which is to the grand jury aforesaid unknown) so given and administered to him by the said Albert T. Patrick, as aforesaid, did take and receive and swallow down into his body, by reason and by means of which taking and receiving and swallowing down into his body of the said chloroform and mercury, and the said deadly poisons (a more particular description of which is to the grand jury aforesaid unknown), then and there became and was mortally sick and distempered in his body, and of which said mortal sickness and distemper, he, the said William Marsh Rice, did then and there die

And so the grand jury aforesaid do say, that the said Albert T. Patrick, him, the said William Marsh Rice, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and of his malice aforethought, did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

#### Tenth Count.

And the grand jury aforesaid, by this indictment, further accuse the said Albert T. Patrick of the same crime of murder in the first degree, committed as follows:

The said Albert T. Patrick, late of the borough of Manhattan of the city of New York, in the county of New York, aforesaid, on the twenty-third day of September, in the year of our Lord one thousand and nine hundred, at the borough, city and county aforesaid, contriving and intending, wilfully, feloniously and of his malice aforethought, the said William Marsh Rice, with poison to kill and murder, in and upon him, the said William Marsh Rice, in the peace of the said people then and there being, wilfully, feloniously and of his malice aforethought, did make an assault, and a quantity of a certain deadly poison called chloroform, and of a certain deadly poison called mercury, and of a certain deadly poisons (a more particular description of which is to the grand jury aforesaid unknown) did then and there wilfully, feloni-

ously and of his malice aforethought, give and administer unto him, the said William Marsh Rice, with the intent that he, the said William Marsh Rice, should take and receive the same and swallow the same down into his body, he, the said Albert T. Patrick, then and there well knowing the said chloroform and the said mercury, and the said deadly poisons (a more particular description of which is to the grand jury aforesaid unknown) to be deadly poisons; and the said William Marsh Rice, the said chloroform and the said mercury, and the said deadly poisons (a more particular description of which is to the grand jury aforesaid unknown), so given and administered to him by the said Albert T. Patrick, as aforesaid, did then and there take and receive and swallow down into his body, by reason and by means of which taking and receiving and swallowing down into his body of the said chloroform and the said mercury, and the said deadly poisons (a more particular description of which is to the grand jury aforesaid unknown), he, the said William Marsh Rice, did then and there die.

And so the grand jury aforesaid do say, that the said Albert T. Patrick, him, the said William Marsh Rice, in the manner and form aforesaid, and by the means aforesaid, wilfully, feloniously and of his malice aforethought, did poison, kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

#### EUGENE A. PHILBIN,

District Attorney.1

[1. In People v. Patrick, 182 N. Y. 131, 74 N. E. 843, a judgment of conviction on the above indictment was affirmed.]

# FORM 99.

#### Murder.

The People of the State of New York v. Edward Sexton.

The grand jury of the county of Ontario by this indictment accuse Edward Sexton of the crime of murder in the first degree, committed as follows:

The said Edward Sexton, at the town of Farmington, in said county of Ontario, on the 26th day of June, in the year of our Lord one thousand nine hundred and three, with force and arms in and upon one Thomas Mahaney, Jr., in the peace of the people of the State of New York then and there being, feloniously, wilfully, and from a deliberate and premeditated design to effect the death of him the said Thomas Mahaney, Jr., did make an assault, and he the said Edward Sexton then and there, feloniously, wilfully and from a deliberate and premeditated design to effect the death of him said Thomas Mahaney, Jr., a certain shotgun which he the said Edward Sexton in his hands then and there had and held, then and there loaded with shells and

charged with gunpowder, leaden shot and percussion caps, to, at, and against him the said Thomas Mahaney, Jr., did then and there feloniously shoot off and discharge, giving unto him the said Thomas Mahaney, Jr., then and there in and upon the breast, head, neck and body of him the said Thomas Mahaney, Jr., with the said shotgun aforesaid, mortal wounds on the left side of the head of him the said Thomas Mahaney. Jr., being shot-holes extending through the skull and entering the brain, of which said mortal wounds he the said Thomas Mahaney, Jr., at the town and county aforesaid did die.

And so this grand jury aforesaid do say, that the said Edward Sexton, the said Thomas Mahaney, Jr., in the manner and form and by the means aforesaid, wilfully, feloniously and from a deliberate and premeditated design to effect death, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

ROBERT F. THOMPSON, District Attorney of the County of Ontario.<sup>2</sup>

[2. In People v. Sexton, 187 N. Y. 495, — N. E. —, a judgment of conviction on the above indictment was affirmed.]

#### FORM 100.

## Murder.

CITY AND COUNTY OF NEW YORK, SS.:

The jurors of the people of the State of New York, in and for the body of the city and county of New York, upon their oath, present:

That Mortimer Shay, late of the first ward of the city of New York, in the county of New York aforesaid, on the twenty-third day of November, in the year of our Lord one thousand eight hundred and fifty-nine, at the ward, city and county aforesaid, with force and arms, in and upon one John Leary, in the peace of the people of the State then and there being, wilfully and feloniously, and of his malice aforethought, did make an assault. And that the said Mortimer Shay, a certain knife, which he, the said Mortimer Shay, in his right hand then and there had and held, him, the said John Leary, in and upon the forehead, then and there wilfully and feloniously, and of his malice aforethought, did beat, strike, stab, cut and wound, giving unto the said John Leary, then and there, with the knife aforesaid, in and upon the forehead of him, the said John Leary, one mortal wound, of the breadth of one inch, and of the depth of three inches, of which said mortal wound he, the said John Leary, at the ward, city and county aforesaid, from the said twenty-third day of November, in the year aforesaid, until the twenty-sixth day of November, in the same year aforesaid, did languish, and languishing

did live, and on which said twenty-sixth day of November, in the year aforesaid, the said John Leary, at the ward, city and county aforesaid, of the said mortal wound, did die. And so the jurors aforesaid, upon their oaths aforesaid, do say that he, the said Mortimer Shay, him, the said John Leary, in the manner and form, and by means aforesaid, at the ward, city and county aforesaid, on the day and the year aforesaid, wilfully and feloniously, and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

NELSON J. WATERBURY,

District Attorney.3

[3. Shay v. People, 4 Park. Cr. R. (N. Y.) 353, holding that the clerical omission of the word "with" before the words "a certain knife" did not vitiate the indictment, the offense being sufficiently charged in other clauses.]

#### FORM 101.

#### Murder by Poison.

CITY AND COUNTY OF ALBANY, 88 .:

The jurors for the people of the State of New York, in and for the body of the city and county of Albany, being then and there sworn and charged upon their oath, present:

That Mary Hartung, late of the city of Albany, in the county of Albany. aforesaid, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, wickedly contriving and intending one Emil Hartung, the husband of the said Mary Hartung, with poison, wilfully, feloniously and of her malice aforethought, to kill and murder, on the 10th day of April, in the year of our Lord, one thousand eight hundred and fiftyeight, with force and arms, at the city of Albany, in the county of Albany, aforesaid, feloniously, wilfully, and of her malice aforethought, did convey and have into the dwelling house of said Emil Hartung, there situate, a great quantity of white arsenic, to wit, ten drachms of white arsenic, being a deadly poison, and that the said Mary Hartung, afterwards, to wit, on the same day and year and place aforesaid, the said white arsenic in the said house, then and there being, then and there feloniously, wilfully, and of her malice aforethought, with the intent aforesaid, did put into and mix and mingle with certain water, gruel, beer, and soup, and certain other substances to the jurors aforesaid unknown, the said Mary Hartung then and there, knowing the said white arsenic to be deadly poison, and that the said Mary Hartung afterwards, to wit, on the same day and year aforesaid, at the city of Albany, in the county of Albany, aforesaid, wilfully, feloniously. and of her malice aforethought, did take, give, administer, and deliver to the

said Emil Hartung, the said white arsenic, so put into, mixed, and mingled, in manner and form aforesaid, with the intention that he, the said Emil Hartung, should take, drink, and swallow down the same into his body, the said Mary Hartung then and there well knowing the said white arsenic to be a deadly poison and the said white arsenic so taken, given, administered, and delivered to said Emil Hartung, by the said Mary in manner and form as aforesaid, the said Emil Hartung did take, drink and swallow down into his body, he, the said Emil Hartung, not knowing that there was any white arsenic or other poisonous ingredient put into, mixed and mingled with the said water, gruel, beer and soup aforesaid, and substances as aforesaid, by means thereof, the said Emil Hartung became and was mortally sick and distempered in his body; and the said Emil Hartung, of the poison aforesaid, so by him taken, drank, and swallowed down into his body, as aforesaid, and of the mortal sickness and distemper occasioned thereby, from the said 10th day of April, in the year aforesaid, until the 21st day of April, in the year aforesaid, at the city of Albany, and county of Albany, aforesaid, did languish, and languishing did live, on which said 21st day of April in the year aforesaid, at the city of Albany, in the county of Albany aforesaid, said Emil Hartung, of the poison aforesaid, so given, administered and delivered, taken, drank and swallowed down, as aforesaid, and of the said mortal sickness and distemper occasioned thereby, died, and so the jurors aforesaid, do say, that the said Mary Hartung, in manner and form aforesaid, him the said Emil Hartung, feloniously, wilfully, and of her malice aforethought, did kill, and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That William Reimann, late of the city of Albany, in the county of Albany aforesaid, laborer before the said felony, and murder was committed, in manner and form aforesaid, by the said Mary Hartung, to wit: On the tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, at the city of Albany, in the county of Albany, aforesaid, was accessory thereto before the fact, and then and there feloniously, wilfully, and of his malice aforethought, did counsel, hire, advise, command, and procure the said Mary Hartung, the felony and murder aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, further present: That the said Mary Hartung, wilfully contriving and intending said Emil Hartung, with poison, wilfully, feloniously, and from premeditated design to effect the death of said Emil Hartung, to kill and murder, on the said tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, with force and arms, at the city of Albany, in the county of Albany aforesaid, feloniously, wilfully and from a premeditated design to effect the death of him, the said Emil Hartung, did convey, and have into the house of said

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Emil Hartung, there situate, a great quantity of white arsenic, to wit, tex drachms of white arsenic, being a deadly poison, and that the said Mary Hartung afterwards, to wit, on the same day and year and place aforesaid, the said white arsenic in the said house, then and there being, then and there feloniously, wilfully, and from a premeditated design to effect the death of him, the said Emil Hartung, and with the intention, aforesaid, did put into, mix and mingle with certain water, gruel, beer, and soup, and certain other substances, to the jurors aforesaid unknown, the said Mary Hartung, then and there, well knowing said white arsenic to be a deadly poison, and that the said Mary Hartung, afterwards, to wit, on the same day and year aforesaid, at the city of Albany, in the county of Albany, aforesaid, wilfully, feloniously, and from a premeditated design to effect the death of the said Emil Hartung, did take, give, administer, and deliver to the said Emil Hartung the said white arsenic, so put into, mixed and mingled, in manner and form aforesaid, with the intent that he, the said Emil Hartung, should take, drink, and swallow, down the same into his body; the said Mary Hartung then and there, well knowing the said white arsenic to be a deadly poison, and the said white arsenic so taken, given, administered, and delivered to the said Emil Hartung, by the said Mary Hartung, in manner and form as aforesaid, the said Emil Hartung did take, drink, and swallow down into his body, he the said Emil Hartung, not knowing that there was any white arsenic or other poisonous gredients, put into, mixed and mingled with the said water, gruel, beer and and soup and substances as aforesaid, by means whereof the said Emil Hartung became and was mortally sick and distempered in his body, and the said Emil Hartung, of the poison aforesaid, so by him taken, drank, and swallowed down into his body, as aforesaid, and of the mortal sickness and distemper occasioned thereby, from the said tenth day of April, in the year aforesaid, until the twenty-first day of April, in the year aforesaid, at the city of Albany, in the county of Albany aforesaid, did languish, and languishing did live, on which 21st day of April, in the year aforesaid, at the city of Albany, in the county of Albany aforesaid, the said Emil Hartung, of the poison aforesaid, so given, administered, and delivered, taken, drank and swallowed down, as aforesaid, and of the said mortal sickness and distemper, occasioned thereby, died. And so the jurors aforesaid, upon their oath aforesaid, do say, the said Mary Hartung, in manner and form aforesaid, him the said Emil Hartung, feloniously, wilfully, and from a premeditated design to effect the death of him, the said Emil Hartung, did kill and murder, against the form of the statute, in such case made and provided, and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Reimann, before the said felony and murder was committed, in manner and form aforesaid, by the said Mary Hartung, to wit: On the 10th day of April, in the year of our Lord one thousand, eight hundred and fifty-eight, at the city of Albany, in the county of Albany aforesaid, was accessory thereto, before the fact, and then and there feloniously, wilfully,

and from a premeditated design to effect the death of the said Emil Hartung, did counsel, advise, command and procure the said Mary Hartung, the felony and murder aforesaid, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Mary Hartung, wilfully contriving and intending the said Emil Hartung with poison, wilfully, feloniously, and of her malice aforethought, to kill and murder, on the said tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, with force and arms, at the city of Albany, in the county of Albany, aforesaid feloniously, wilfully and of her malice aforethought, did convey and have into the dwelling-house of said Emil Hartung, there situate, a great quantity of the sulphuret of arsenic, to wit, ten drachms of the sulphuret of arsenic, being a deadly poison, and that the said Mary Hartung afterwards, to wit, on the same day and year and place aforesaid, the said sulphuret of arsenic in the said house then and there being, then and there feloniously, wilfully, and of her malice aforethought, with the intent aforesaid, did put into, mix, and mingle with certain water, gruel, beer and soup, and certain other substances to the jurors aforesaid unknown, the said Mary Hartung then and there well knowing the said sulphuret of arsenic to be a deadly poison, and that the said Mary Hartung afterwards, to wit, on the same day and year aforesaid, at the city of Albany, in the county of Albany, aforesaid, wilfully, feloniously, and of her malice aforethought, did take, give, administer and deliver to the said Emil Hartung the said sulphuret of arsenic, so put into, mixed and mingled, in manner and form aforesaid, with intent that he, the said Emil Hartung, should take, drink, and swallow down the same into his body, the said Mary Hartung then and there well knowing the said sulphuret of arsenic to be a deadly poison and the said sulphuret so taken, given, administered and delivered to the said Emil Hartung by the said Mary Hartung, in manner and form aforesaid, the said Emil Hartung did take, drink and swallow down into his body, he, the said Emil Hartung, not knowing that there was any sulphuret of arsenic or any other poisonous ingredient put into, mixed and mingled with the said water, gruel, beer and soup aforesaid, and substances as aforesaid, by means whereof the said Emil Hartung became and was mortally sick and distempered in his body, and the said Emil Hartung, of the poison aforesaid, so by him taken, drank and swallowed down into his body, as aforesaid, and of the mortal sickness and distemper occasioned thereby, from the said tenth day of April, in the year aforesaid, until the twenty-first day of April, in the year aforesaid, at the city of Albany, in the county of Albany aforesaid, did languish, and languishing, did live, on which said twenty-first day of April, in the year aforesaid, at the city of Albany, in the county of Albany aforesaid, the said Emil Hartung, of the poison aforesaid, so given, administered and delivered, taken, drank and swallowed down as aforesaid, and of the said mortal sickness and distemper occa-

sioned thereby, died. And the jurors aforesaid, upon their oath aforesaid, do say, that the said Mary Hartung, in manner and form aforesaid, him, the said Emil Hartung, feloniously, wilfully, and of her malice aforethought, did kill, and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said William Reimann, late of the city of Albany, and county of Albany aforesaid, before the said felony and murder was committed, in manner and form aforesaid, by the said Mary Hartung, to wit, on the tenth day of April, in the year of our Lord one thousand eight hundred fifty-eight, at the city of Albany, in the county of Albany aforesaid, was accessory thereto before the fact, and then and there feloniously, and wilfully, and of his malice aforethought, did counsel, hire, advise, command and procure the said Mary Hartung, the felony and murder aforesaid, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided and against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Mary Hartung, wilfully contriving and intending the said Emil Hartung with poison, wilfully, feloniously, and from a premeditated design to effect the death of said Emil Hartung, to kill and murder, on the said tenth day of April, in the year of our Lord, one thousand eight hundred fiftyeight, with force and arms, at the city of Albany, in the county of Albany aforesaid, feloniously, wilfully, and from a premeditated design to effect the death of him, the said Emil Hartung, did convey and have into the house of said Emil Hartung, there situate, a great quantity of the sulphuret of arsenic, to wit, ten drachms of the sulphuret of arsenic, being a deadly poison, and that the said Mary Hartung, afterwards, to wit, on the same day and year and place aforesaid, the said sulphuret of arsenic in the said house then and there being, then and there feloniously, wilfully, and from a premeditated design to effect the death of him, the said Emil Hartung, and with the intent aforesaid, did put into, mix and mingle with certain water, gruel, beer and soup, and certain other substances to the jurors aforesaid unknown, the said Mary Hartung, then and there, well knowing the said sulphuret of arsenic to be a deadly poison, and that the said Mary Hartung, afterwards, to wit. on the same day and year aforesaid, at the city of Albany, in the county of Albany aforesaid, wilfully, feloniously, and from a premeditated design to effect the death of him, the said Emil Hartung, did take, give, administer and deliver to the said Emil Hartung, the said sulphuret of arsenic, so put into, mixed, and mingled, in manner and form aforesaid, with the intent that he, the said Emil Hartung, should take, and swallow down the same into his body; the said Mary Hartung then and there well knowing the said sulphuret of arsenic so taken, given, administered and delivered, to the said Emil Hartung, in manner and form as aforesaid, the said Emil Hartung

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did take, drink, and swallow down into his body, he the said Emil Hartung not knowing that there was any sulphuret of arsenic, or other poisonous ingredients, put into, mixed and mingled with the said water, gruel, beer and soup, and substances as aforesaid, by means whereof said Emil Hartung became and was mortally sick and distempered in his body, and the said Emil Hartung of the poison aforesaid, so by him taken, drank, and swallowed down into his body as aforesaid, and of the mortal sickness and distemper occasioned thereby, from the said tenth day of April, in the year aforesaid, until the twenty-first day of April, in the year aforesaid, at the city of Albany, in the county of Albany, aforesaid, did languish, and languishing, did live, on which said twenty-first day of April, in the year aforesaid, at the city of Albany, in the county of Albany, aforesaid, the said Emil Hartung, of the poison aforesaid, so given, administered, and delivered, taken, drank, and swallowed down as aforesaid, and of the said mortal sickness and distemper occasioned thereby died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Mary Hartung, in manner and form aforesaid, him, the said Emil Hartung, feloniously, wilfully, and from a premeditated design to effect the death of him, the said Emil Hartung, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said William Reimann, before the said felony and murder was committed, in manner and form aforesaid, by the said Mary Hartung, to wit, on the 10th day of April, in the year of our Lord, one thousand eight hundred fifty-eight, at the city of Albany, in the county of Albany, aforesaid, was accessory thereto before the fact, and then and there feloniously, wilfully, and from a premeditated design to effect the death of him, the said Emil Hartung, did counsel, advise, command, and procure the said Mary Hartung, the felony and murder aforesaid, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Mary Hartung, feloniously, wilfully, and of her malice aforethought, and from a premeditated design to effect the death of the said Emil Hartung, devising and intending the said Emil Hartung to poison, kill and murder, on the tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, with force and arms, at the city of Albany, in the county of Albany aforesaid, a certain quantity of deadly poison, to wit, ten drachms of deadly poison, a more particular description of which is to the jurors aforesaid unknown, feloniously, wilfully, and of her malice aforethought, and from a premeditated design to effect the death of the said Emil Hartung, did give and administer unto the said Emil Hartung, with intent that he should take, drink, and swallow down the same into his body, the said Mary Hartung, then and there well knowing the same to be a deadly poison, and the said deadly poison so given and administered unto the said Emil

Hartung, as aforesaid, the said Emil Hartung did then and there take and swallow down into his body, by means and by reason of which said taking, drinking and swallowing down the said deadly poison into his body as aforesaid, the said Emil Hartung became and was mortally sick and distempered in his body, of which said mortal sickness and distemper the said Emil Hartung, from the said tenth day of April, in the year last aforesaid, until the twenty-first day of April, of the same month of the same year, at the city and county of Albany aforesaid, did languish, and languishing, did live, on which said twenty-first day of April, in the year aforesaid, at the city of Albany, and county of Albany aforesaid, the said Emil Hartung, of the poison aforesaid, so given, administered, taken, and swallowed down as aforesaid, and of the said mortal sickness and distemper occasioned thereby, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Mary Hartung, him, the said Emil Hartung, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, and from a premeditated design to effect the death of him, the said Emil Hartung, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Reimann, before the said felony and murder was committed, in manner and form aforesaid, by the said Mary Hartung, to wit, on the tenth day of April, in the year of our Lord one thousand eight hundred fifty-eight, at the city of Albany, in the county of Albany aforesaid, was accessory thereto before the fact, and then and there feloniously, wilfully, and of his malice aforethought, and from a premeditated design to effect the death of the said Emil Hartung, did counsel, advise, command and procure the said Mary Hartung, the felony and murder aforesaid, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

SAMUEL G. COURTNEY, District Attorney.4

[4. People v. Hartung, 4 Park. Cr. R. (N. Y.) 256. Form used in this case, for murder by poisoning, against one as principal and another as accessory pefore the fact, with counts at common law and under the statute.]

#### FORM 102.

#### Murder.

At a Court of Sessions, holden at the court-house in the town of Ithaca, in and for the county of Tompkins, on the second day of June, in the year one thousand eight hundred and fifty-six, before Honorable Samuel P. Wisner, county judge, and Clinton Bowker and William B. Speed, justices of the peace and members of said court, in and for the county of Tompkins:

The jurors of the people of the State of New York, in and for the body of the county of Tompkins, to wit, etc., good and lawful men of said county, then and there being duly sworn and charged to inquire for the people of the State of New York, and for the body of the county aforesaid, upon their oaths present: That Edward H. Rulloff, late of the town of Lansing, in said county of Tompkins, heretofore, to wit, on the twenty-third day of year of our Lord one thousand eight hundred June, in the forty-five, at the town of Lansing, in the county aforesaid, with force and arms, in and upon one - Ruloff, the infant daughter of said Edward H. Rulloff, whose christian name is to the jurors unknown, in the peace of God and the people of the State of New York then and there being. feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Edward H. Rulloff, with a certain knife of the value of six cents, which he, the said Edward H. Rulloff, in his right hand then and there had and held, the said --- Rulloff, infant daughter of said Edward H. Rulloff, in and upon the left side, between the short ribs of her, the said --- Rulloff, infant daughter of said Edward H. Rulloff, then and there feloniously, wilfully and of his malice aforethought, did strike and thrust, giving to the said - Rulloff, infant daughter of said Edward H. Rulloff, then and there with the knife aforesaid, in and upon the said left side, between the short ribs of her, the said - Rulloff, infant daughter of said Edward H. Ruloff, one mortal wound of the breadth of three inches, and of the depth of six inches, of which said mortal wound the said ----- Rulloff, infant daughter of said Edward H. Rulloff, from the twenty-third day of June, in the year aforesaid, until the twenty-fourth day of the same month, in the year aforesaid, did languish, and languishing did live; on which said twenty-fourth day of June, in the year aforesaid, at the town aforesaid, in the county aforesaid, of the said mortal wound, said - Rulloff, infant daughter of said Edward H. Rulloff, died, and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Edward H. Rulloff, the said ---- Rulloff, infant daughter of said Edward H. Rulloff, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Edward H. Rulloff, late of the town of Lansing, in said county of Tompkins, to wit, on the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and forty-five, with force and arms, at the town of Lansing, in the county aforesaid, in and upon one —— Rulloff, the infant daughter of said Edward H. Rulloff, whose christian name is to the jurors unknown, in the peace of God and of the people of the State of New York then and there being, feloniously wilfully, and of his malice aforethought, did make an assault; and that the said Edward H. Rulloff with both his hands and feet, the said —— Rulloff, infant daughter of said Edward H. Rulloff, to and against the ground then and there feloniously, wilfully and of his

malice aforethought, did cast and throw, and that the said Edward H. Rulloff, with both the hands and feet of him, the said Edward H. Ruloff, then and there, and whilst the said --- Ruloff, infant daughter of said Edward H. Ruloff, was so lying upon the ground, the said - Rulloff, infant daughter of said Edward H. Rulloff, in and upon the head, stomach, back, and sides of her, the said ---- Rulloff, infant daughter of said Edward H. Rulloff, then and there feloniously, wilfully, and of his malice aforethought, did strike, beat and kick, giving to the said - Rulloff, infant daughter of said Edward H. Rulloff, then and there, as well by the casting and throwing of her, the said ---Rulloff, infant daughter of said Edward H. Rulloff, to the ground as aforesaid, as also by striking, beating and kicking the said ------ Rulloff, infant daughter of said Edward H. Rulloff, in and upon the head, stomach, back and sides of her, the said - Rulloff, infant daughter of said Edward H. Rulloff, with both the hands and feet of him, the said Edward H. Rulloff, in manner aforesaid, several mortal bruises, in and upon the head, stomach, back and sides of her, the said - Rulloff, infant daughter of said Edward H. Rulloff, of which said several mortal bruises she, the said ---- Rulloff, infant daughter of the said Edward H. Rulloff, then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Edward H. Rulloff, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oaths aforesaid, do further present: That Edward H. Rulloff, late of the town of Lansing, in said county of Tompkins, heretofore, to wit, on the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and forty-five, with force and arms, at the town of Lansing, in the county aforesaid, in and upon - Rulloff, the infant daughter of said Edward H. Rulloff, whose christian name is to the jurors unknown, in the peace of God and of the people of the State of New York then and there being, feloniously, willfully and of his malice aforethought, did make an assault and that the said Edward H. Rulloff, a certain silk handkerchief, of the value of one dollar, about the neck of her, the said - Rulloff, infant daughter of said Edward H. Rulloff, then and there, feloniously, wilfully and of his malice aforethought, did fix, tie and fasten; and that the said Edward H. Rulloff, with the silk handkerchief aforesaid, her, the said --- Rulloff, infant daughter of said Edward H. Rulloff, then and there, feloniously, wilfully and of his malice aforethought did choke, suffocate and strangle, of which said choking, suffocation and strangling, she, the said ----Rulloff, infant daughter of said Edward H. Rulloff, then and there instantly died, and so the jurors aforesaid, upon their oath aforesaid, do say that the said Edward H. Rulloff, the said ---- Rulloff, infant daughter of said Edward H. Rulloff, in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present:

That Edward H. Rulloff, late of the town of Lansing, in the county of Tompkins, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and of his malice aforethought, wickedly contriving and intending one --- Rulloff, the infant daughter of said Edward H. Rulloff, whose christian name is to the jurors unknown, with poison, wilfully, feloniously, and of his malice aforethought, to kill and murder, on the twenty-third day of June, in the year of our Lord one thousand eight hundred and forty-five, with force and arms, at the town aforesaid, in the county aforesaid, feloniously, wilfully and of his malice aforethought, a large quantity of a certain deadly poison called arsenic, to wit, the quantity of two drachms of the said arsenic, did put, mix, and mingle into and with a certain quantity of milk, which the said ---- Rulloff, infant daughter of said Edward H. Rulloff, was then and there about to drink, the said Edward H. Rulloff then and there well knowing that the said - Rulloff, infant daughter of said Edward H. Rulloff, intended and was then about to drink the said milk, and the said Edward H. Rulloff then and there also well knowing the said arsenic, so as aforesaid by him put, mixed and mingled into and with the said milk, to be a deadly poison, and the said - Rulloff, infant daughter of said Edward H. Rulloff, afterwards, to wit, on the day and year aforesaid, at the town aforesaid, in the county aforesaid, did take, drink and swallow down a large quantity, to wit, half a pint, of the said milk with which the said arsenic was so mixed and mingled by the said Edward H. Rulloff, as aforesaid (she, the said ---- Rulloff, infant daughter of said Edward H. Rulloff, at the time she so took, drank and swallowed down the said milk, not knowing there was any arsenic, or any other poisonous or hurtful ingredient mixed or mingled with the said drink), by means whereof she, the said - Rulloff, infant daughter of said Edward H. Rulloff, then and there became sick and greatly distempered in her body; and the said - Rulloff, infant daughter of said Edward H. Rulloff, of the poison aforesaid, so by her taken, drank and swallowed down as aforesaid, and of the sickness occasioned thereby, from the said twenty-third day of June, in the year last aforesaid, until the twenty-fourth day of the same month in the same year, at the town aforesaid, in the county aforesaid, did languish, and languishing, did live; on which said twenty-fourth day of June, in the year aforesaid, at the town aforesaid, in the county aforesaid, the said - Rulloff, infant daughter of said Edward H. Rulloff, of the said poison died; and so the jurors aforesaid, upon their oaths aforesaid, do say, that the said Edward H. Rulloff, the said - Rulloff, infant daughter of said Edward H. Rulloff, in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, against the peace of the people of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Edward H. Ruloff, late of the town of Lansing, in the county of Tompkins, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the twenty-third day of June, in the year of our Lord one thousand eight hundred and forty-five, with force and arms,

at the town aforesaid, in the county aforesaid, in and upon one - Rulloff, infant daughter of said Edward H. Rulloff, whose christian name is to the jurors unknown, in the peace of God and of the people of the State of New York then and there being, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said Edward H. Rulloff, with a certain weapon, to the jurors aforesaid unknown, of the value of six cents, which he, the said Edward H. Rulloff, in his right hand then and there had and held, the said - Rulloff, infant daughter of said Edward H. Rulloff, in and upon the left side of the head, then and there, feloniously, wilfully and of his malice aforethought, did strike and thrust, giving to the said ---- Rulloff, infant daughter of said Edward H. Rulloff, then and there, with the weapon aforesaid, in and upon the said left side of the head, one mortal wound, of which mortal wound the said ---- Rulloff, infant daughter of said Edward H. Rulloff, from the said twenty-third day of June, in the year aforesaid, until the twenty-fourth of the same month, in the year aforesaid, at the town aforesaid, in the county aforesaid, did languish and languishing did live; on which said twenty-fourth day of June, in the year aforesaid, the said - Rulloff, infant daughter of said Edward H. Rulloff, at the town aforesaid, in the county aforesaid, of the said mortal wound died; and so the jurors aforesaid upon their oath aforesaid, do say that the said Edward H. Rulloff the said ---- Rulloff, the infant daughter of said Edward H. Rulloff, whose christian name is to the jurors unknown, in manner and form aforesaid feloniously, wilfully and of his malice aforethought, did kill and murder, against the peace of the people of the State of New York, and their dignity.

J. A. WILLIAMS,

District Attorney.5

[5. People v. Rulloff, 3 Park. Cr. R. (N. Y.) 401, 402. Form used in this case for murder of an infant child, whose name and the manner of whose death were unknown, with counts in various forms to meet the circumstantial evidence on which the prosecution relied to prove the *corpus delicti*.]

# FORM 103.

#### Murder by Poison.

CITY AND COUNTY OF NEW YORK, SS.:

The jurors of the people of the State of New York, in and for the body of the city and county of New York, upon their oath, present: That Andrew Williams, late of the first ward of the city of New York, aforesaid, laborer, of his malice aforethought, wickedly contriving and intending one Rose Williams, with poison, wilfully, feloniously and of his malice aforethought to kill and murder, on the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and fifty-four, at the ward, city and county

aforesaid, with force and arms, a certain quantity of arsenic, to wit, two drachms of arsenic, being a deadly poison, feloniously, wilfully and of his malice aforethought, did infuse, mix and mingle in and together with a certain quantity of liquor (to the jurors aforesaid unknown), he, the said Andrew Williams, then and there well knowing said arsenic to be a deadly poison. And the said Andrew Williams afterwards, to wit, on the day and in the year aforesaid, at the ward, city and county aforesaid, the poison aforesaid, so as aforesaid infused, mixed and mingled with the said liquor (to the jurors aforesaid unknown) aforesaid, feloniously, wilfully, and of his malice aforethought, did give and administer to her, the said Rose Williams, to take, drink and swallow down into her body; and she, the said Rose Williams, not knowing the poison aforesaid to have been mixed and mingled as aforesaid, afterwards, to wit, on the day and year aforesaid, at the ward, city and county aforesaid, the said poison, so as aforesaid mixed and mingled, by the persuasion and procurement of the said Andrew Williams, did take, drink and swallow down into her body. And thereupon the said Rose Williams, by the poison aforesaid, so mixed and mingled, as aforesaid, by the said Andrew Williams, and so taken, drank and swallowed down into her body, as aforesaid, became then and there sick and distempered in her body; and the said Rose Williams, of the poison aforesaid, and of the sickness and distemper occasioned thereby, from the said twenty-ninth day of April, in the year last aforesaid, until the fourth day of May, in the last year aforesaid, did languish, and languishing did live. On which said fourth day of May, she, the said Rose Williams, at the sixth ward of the city and county aforesaid, of the poison aforesaid, and of the sickness and distemper thereby occasioned, as aforesaid, died.

And the jurors aforesaid, upon their oath aforesaid, do say, that the said Andrew Williams, her, the said Rose Williams, in manner and form, and by the means aforesaid, then and there feloniously, wilfully and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

#### Second Count.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Andrew Williams afterwards, to wit, on the third day of May, in the year of our Lord one thousand eight hundred and fifty-four, at the sixth ward of the city and county aforesaid, wickedly, feloniously and of his malice aforethought, contriving and intending one Rose Williams to kill and murder, with force and arms, in and upon the said Rose Williams, then and there being, feloniously, wilfully and of his malice aforethought, did give and administer unto the said Rose Williams, with intent that she should take and swallow the same into her body, he, the said Andrew Williams, then and there well knowing the said arsenic to be a deadly poison. And the said Rose Williams, the said arsenic, so given and administered unto her by the

said Andrew Williams as aforesaid, did take and swallow down into the body, by reason and by means of which said taking and swallowing down of the said arsenic into her body, as aforesaid, the said Rose Williams became and was mortally sick and distempered in her body, of which said poisoning and mortal sickness and distemper the said Rose Williams, on the fourth day of the same month of May, in the same year aforesaid, at the ward, city and county aforesaid, died. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said Andrew Williams the said Rose Williams, in manner and form aforesaid, feloniously, wilfully and of his malice aforethought did kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.6

[6. People v. Williams, 3 Park. Cr. R. (N. Y.) 84, 85. Form used in this case for murder by poisoning.]

# FORM 104.

#### Murder.

STATE OF SOUTH CAROLINA, COUNTY OF FAIRFIELD:

"At a Court of General Sessions begun and holden in and for the county of Fairfield, in the State of South Carolina, at Winnsboro, in the county and State aforesaid, on the third Monday of February, in the year of our Lord one thousand eight hundred and ninety-three, the juners of and for the county of Fairfield aforesaid, in the State of South Carolina aforesaid, that is to say, upon their oaths, present: That Jasper Atkinson, on the 28th day of January, in the year of our Lord one thousand eight hundred and ninetythree, with force and arms, at Winnsboro, in the county of Fairfield and State aforesaid, in and upon one John H. Clamp, with a certain loaded shotgun, then and there feloniously, wilfully and of his malice aforethought, did make an assault; and that the said Jasper Atkinson, him, the said John H. Clamp, with the loaded shotgun aforesaid, then and there feloniously, wilfully and of his malice aforethought, did shoot, strike, penetrate and wound; giving to the said John H. Clamp thereby, in and upon the right side of the head of him, the said John H. Clamp, one mortal wound; of which said mortal wound the said John H. Clamp then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Jasper Atkinson, him, the said John H. Clamp, in manner and form, and by the means aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder. And the jurors aforesaid, upon their oath, do further present, that John Atkinson, late of the county and State aforesaid, before the said felony and murder was committed, in manner and form aforesaid, to wit, on the twenty-eighth day of the same month of January aforesaid, with force and arms, at Winnsboro, in the county and State aforesaid, feloniously, wilfully

and of his malice aforethought, did incite, move, procure and hire, counsel and command the said Jasper Atkinson, the said felony and murder, in manner and form aforesaid, to do and commit, against the form of the act of the General Assembly of the said State in such case made and provided, and against the peace and dignity of the same State aforesaid."7

[7. State v. Atkinson, 40 S. C. 364, etc., 365.]

## FORM 105.

#### Murder.

THE STATE OF SOUTH CAROLINA, ORANGEBURG COUNTY, IN THE GENERAL SESSIONS.

At a Court of General Sessions, begun and holden in and for the county of Orangeburg, in the State of South Carolina, at Orangeburg, in the county and State aforesaid, on the third Monday of September, in the year of our Lord one thousand eight hundred and eighty-seven, the jurors of and for the county aforesaid, in the State aforesaid, upon their oath, present: Alexander C. Norton and A. Richard Norton, late of the county of Orangeburg, on the twenty-third day of June, in the year of our Lord one thousand eight hundred and eighty-seven, with force and arms, at McNeill's, in the county of Orangeburg, and State aforesaid, in and upon one J. Lafayette Hamlin, in the peace of God, and of the said State, then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault; and that the said A. Richard Norton, a certain pistol of the value of one dollar, then and there charged with gunpowder, and one leaden bullet, which said pistol, he, the said A. Richard Norton, in his right hand, then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, at, against, and upon the said J. Lafayette Hamlin; and that the said A. Richard Norton, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said A. Richard Norton discharged and shot off, as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate and wound him, the said J. Lafayette Hamlin, in and upon the right side of the neck of him, the said J. Lafayette Hamlin, giving unto him, the said J. Lafayette Hamlin, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said A. Richard Norton, in and upon the right side of the neck of him, the said J. Lafayette Hamlin, one mortal wound of the depth of five inches, and of the breadth of one-fourth of an inch, of which mortal wound he, the said J. Lafayette Hamlin, then and there instantly

died; and that the said Alexander C. Norton then and there feloniously, wilfully, and of his malice aforethought, was present, aiding, abetting, counselling, advising and assisting him, the said A. Richard Norton, the felony and murder aforesaid, in manner and form aforesaid, to do and commit. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Alexander C. Norton and the said A. Richard Norton, him, the said J. Lafayette Hamlin, then and there, in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace and dignity of the same State aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Alexander C. Norton and A. Richard Norton, on the twentythird day of June, in the year of our Lord one thousand eight hundred and eighty-seven, with force and arms, at McNeill's, in the county of Orangeburg, and State aforesaid, in and upon one J. Lafayette Hamlin, in the peace of God and of the said State, then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said Alexander C. Norton, with a certain knife, of the value of one dollar, which he, the said Alexander C. Norton, in his right hand, then and there had and held, him, the said J. Lafayette Hamlin, in and upon the right side of the neck of him, the said J. Lafayette Hamlin, then and there feloniously, wilfully and of his malice aforethought, did strike, penetrate, and wound, giving unto the said J. Lafayette Hamlin, then and there, with the knife aforesaid, by the stroke aforesaid, in manner aforesaid, in and upon the right side of the neck of him, the said J. Lafayette Hamlin, one mortal wound, of the length of five inches, and of the depth of three inches, of which said mortal wound the said J. Lafayette Hamlin then and there instantly died, and that the said A. Richard Norton then and there feloniously, wilfully, and of his malice aforethought, was present, aiding, abetting, counselling, advising and assisting the said Alexander C. Norton, the felony and murder aforesaid, in manner and form aforesaid, to do and commit. And so the jurors aforesaid, upon their oath aforesaid, say: That the said Alexander C. Norton and the said A. Richard Norton, him, the said J. Lafayette Hamlin, then and there, in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace and dignity of the same State aforesaid."8

[8. State v. Norton, 28 S. C. 572, 574, holding the joinder of counts as to the commission of the murder no objection.]

#### FORM 106.

#### Murder.

THE STATE OF SOUTH CAROLINA, EDGEFIELD DISTRICT, TO WIT.

At a Court of Sessions, begun to be holden in and for the District of Edgefield, in the State of South Carolina, at Edgefield court house, in the district and State aforesaid, on the fourth Monday in March, in the year of our Lord one thousand eight hundred and thirty-eight, the jurors of and for the district of Edgefield aforesaid, in the State of South Carolina aforesaid, that is to say:

Upon their oath present, that Wiley Freeman, laborer, on the tenth day of April, in the year of our Lord one thousand eight hundred and thirty-seven, with force and arms, at Edgefield court house, in the district and State aforesaid, in and upon one Mary Freeman, in the peace of God and this State, then and there being, feloniously, wilfully, and of his malice aforethought. did make an assault, and that the said Wiley Freeman, with a certain gun called a rifle gun, of the value of ten dollars, then and there charged with gunpowder and two leaden bullets, which said gun, he the said Wiley Freeman, in both his hands then and there had and held, at and against the said Mary Freeman, then and there, feloniously, wilfully, and of his malice aforethought, did shoot off and discharge, and that the said Wiley Freeman, with the leaden bullets aforesaid, by means of shooting off and discharging the said gun so loaded, to, at and against the said Mary Freeman, as aforesaid, did then and there feloniously, wilfully, and of his malice aforethought, strike, penetrate and wound the said Mary Freeman, in and upon the left side of the said Mary Freeman, below the left breast of her, the said Mary Freeman, giving to her, the said Mary Freeman, then and there, with the leaden bullets aforesaid, by means of shooting off, and discharging the said gun so loaded, to, at and against the said Mary Freeman, and by such striking, penetrating and wounding the said Mary Freeman, as aforesaid, one mortal wound in, and upon the left side of the said Mary Freeman, below the left breast of the said Mary Freeman, of the depth of four inches, and of the width of one inch, of which said mortal wound the said Mary Freeman, on and from the said tenth day of April, in the year of our Lord one thousand eight hundred and thirty-seven, until the eleventh day of April, in the year of our Lord, one thousand eight hundred and thirty-seven, at Edgefield court house, in the district and State aforesaid, did languish, and languishing did live, on which said eleventh day of April last aforesaid, about the hour of five o'clock in the morning, she, the said Mary Freeman, at Edgefield court house, in the district and State aforesaid, of the mortal wound aforesaid, died, and so the jurors aforesaid, upon their oath do say, that the said Wiley Freeman, he, the said Mary Freeman, in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, against the peace and dignity of the same State aforesaid.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that Wiley Freeman, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the tenth day of April, in the year of our Lord one thousand eight hundred and thirty-seven, with force and arms, at Edgefield court house, in the district and State aforesaid, in and upon Mary Freeman, in the peace of God and this State, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that he, the said Wiley Freeman, with a certain gun, of the value of ten dollars, then and there being charged with gunpowder and a leaden bullet, which gun last aforesaid, he, the said Wiley Freeman, laborer, then and there, in both his hands had and held, at, against and upon her, the said Mary Freeman, then and there feloniously, wilfully and of his malice aforethought, did discharge and shoot off, her, the said Mary Freeman, in and upon the left side of the said Mary Freeman, a little below the left breast of the said Mary Freeman, then and there, feloniously, wilfully and of his malice aforethought, did strike and wound, giving to the said Mary Freeman, then and there the leaden bullet aforesaid, out of the said last mentioned gun aforesaid, discharge and shoot off, in and upon the said the left side of the said Mary Freeman, one other mortal wound, of the breadth of one inch, and of the depth of seven inches, of which the said last mentioned mortal wound, the said Mary Freeman, on and from the said tenth day of April last aforesaid, in the year last aforesaid, until the eleventh day of April last aforesaid, in the year last aforesaid, at Edgefield court house aforesaid, did languish, and languishing did live, on which said eleventh day of April in the year last aforesaid, about the hour of five o'clock in the morning, she, the said Mary Freeman, at Edgefield court house, in the district and State aforesaid, of the mortal wound aforesaid, died; and so the jurors aforesaid, upon their oaths do say, that the said Wiley Freeman. her. the said Mary Freeman, in manner and form last aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, against the peace and dignity of the same State aforesaid.

CALDWELL, Sol.9

[9. State v. Freeman, 1 Spears L. (S. C.), 56, 57, holding in this case on a motion to arrest the judgment, on the ground that there was no sufficient averment that the gun was shot off or that the contents were discharged, that the inference seemed to be one of absolute certainty that the contents of the gun were shot off and discharged, as there could be nothing else to which the words "did shoot off and discharge" with a gun charged with gunpowder and leaden bullets could be applied.]

# FORM 107.

#### Murder.

THE STATE OF SOUTH CAROLINA, COUNTY OF DARLINGTON.

At a Court of General Sessions begun and holden in and for the county of Darlington, in the State of South Carolina, at Darlington, in the county and State aforesaid, on Monday, the - day of March, in the year of our Lord one thousand eight hundred and eighty-eight. The jurors of and for the said county of Darlington aforesaid, in the State of South Carolina aforesaid, that is to say, upon their oaths present that William Scott, Lewis Williams, Robert Arthur and Joseph W. James, on the eighth day of May, in the year of our Lord one thousand eight hundred and eighty-eight, with force and arms, at Darlington, in the county of Darlington, State aforesaid, in and upon one Joseph James, Sr., feloniously, wilfully, and of their malice aforethought, made an assault, and him, the said Joseph James, Sr., with a gun did shoot and wound, giving to him, the said Joseph James, Sr., then and there, by means of the said shooting, in and upon the body of him, the said Joseph James, Sr., one mortal wound, of which said mortal wound, the said Joseph James, Sr., then and there instantly died. And so the jurors aforesaid do say that the said Joseph W. James, the said Joseph James, Sr., in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Lewis Williams, on the eighth day of May, in the year of our Lord one thousand eight hundred and eighty-eight, with force and arms, at Darlington, in the county of Darlington, State aforesaid, in and upon one Joseph James, Sr., feloniously, wilfully and of their malice aforethought, did make an assault, and him, the said Joseph James, Sr., with a gun did shoot and wound, giving to him, the said Joseph James, Sr., then and there by means of said shooting in and upon the body of him, the said Joseph James, Sr., one mortal wound, of which said mortal wound the said Joseph James, Sr., then and there instantly died. And so the jurors aforesaid do say the said Lewis Williams, the said Joseph James, Sr., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder.

And the jurors aforesaid, upon their oaths aforesaid, do further present that Joseph W. James, William Scott and Robert Arthur, late of the county aforesaid, before the said felony and murder was committed, in form aforesaid, to wit, on the second day of May, in the year aforesaid, at Darlington, in the county aforesaid, did feloniously and maliciously incite, move, procure, aid, counsel, hire and command the said Lewis Williams, the said felony and murder in manner and form aforesaid, to do and commit, against the form

of the statute in such case made and provided, and against the peace and dignity of the same State aforesaid.10

[10. State v. Williams, 31 S. C. 238, 239.]

#### FORM 108.

#### Mutilation of Papers or Documents.

The grand jury of the county of Albany accuse Charles F. Peck and Elbert Rodgers of the crime of removing and destroying public documents, committed as follows:

The said Charles F. Peck, heretofore and at the time of commission of the acts hereafter stated, was and now is the Commissioner of Statistics of Labor of the State of New York, a public officer and a public office duly created by an act of the Legislature of the State of New York, and as such commissioner it became and was his duty to collect, assort, systematize and present, in annual reports to the Legislature, statistical details relating to all departments of labor in this State, and especially in relation to the commercial, industrial, social and sanitary conditions of workingmen, and to the productive industries of this State; and that at all the times hereafter referred to it was the legal duty of every person, owner, operator, manager and lessee of every mine, factory, workshop, warehouse, elevator, foundry, machine shop and other manufacturing establishment in the State, and of every agent and employee of such owner, operator, manager and lessee of every such mine, factory, workshop, warehouse, elevator, foundry, machine shop and other manufacturing establishment to furnish to such commissioner when requested by him, statistical and other information in their possession or under their control relative to the lawful duties of such commissioner as above set forth, and to truthfully answer questions concerning such lawful duties of the said commissioner sent to them by said commissioner by circular.

That heretofore and in the year 1891, between the 1st of January and the 31st day of December in said year and in the year 1892, between the 1st day of January and the 1st day of September in said year, the said defendant, Charles F. Peck, as Commissioner of Statistics of Labor of the State of New York, in pursuance of the duties devolved on him by law to collect, assort and systematize statistical details relating to all departments of labor in this State and especially in relation to the commercial, industrial, social and sanitary condition of the workingmen, and to the productive industries of this State, sent circulars to the owners, operators, managers and lessees of the mines, factories, workshops, warehouses, elevators, foundries, machine shops and other manufacturing establishments of this State, which said circulars did then and there contain questions asking for statistical information relating to the lawful duties of such commissioner, and relating to the details of all departments of labor in this State, and especially in relation to the commercial,

industrial, social and sanitary condition of workingmen in this State and to the productive industries of this State, and did at the times aforesaid receive answers to the questions contained in said circulars from the owners, operators, managers and lessees of the mines, factories, workshops, warehouses, elevators, foundries, machine shops and other manufacturing establishments of this State, which said answers were contained in and written on the circulars so sent out by the said Charles F. Peck as Commissioner of Statistics of Labor of the State of New York, and which said answers then and there being, were and are the statistical details relating to all departments of labor in the State of New York, and especially in relation to the commercial, industrial, social and sanitary condition of workingmen of the State of New York and to the productive industries of the State of New York, and which said circulars containing the questions aforesaid, and the answers aforesaid, were sent to and received by the said defendant, Charles F. Peck, as such Commissioner of Statistics of Labor of the State of New York, by due authority of law, at his office in the new capitol in the city of Albany, and known as the Bureau of Labor Statistics of the State of New York, he, the said Charles F. Peck, being then and there a public officer of the State of New York, and received and filed and deposited by said Charles F. Peck in the office of the Bureau of Labor Statistics of the State of New York, at the headquarters thereof in the new capitol, in the city of Albany, the said Bureau of Labor Statistics being and was then and there a public office of the State of New York, and being then and there received, filed and deposited by due authority of law, and being and were then and there public records, books, papers and documents of the State of New York.

And the grand jury further say that the said Charles F. Peck and Elbert Rogers, on the 11th day of September, 1892, at the city of Albany, in this county, feloniously, wilfully, and unlawfully did remove, mutilate, conceal and destroy the public records, books, papers and documents so as aforesaid filed and deposited by due authority of law in the office of the Bureau of Labor Statistics of the State of New York, in the new Capitol, at the city of Albany, the same being then and there a public office of the State of New York, and the same being then and there filed and deposited by due authority of law with the Commissioner of Statistics of Labor of the State of New York, at his office in the new capitol in the city of Albany, he being then and there a public officer of the State of New York, and which said public records, books, papers and documents aforesaid did then and there relate to and were the official statistical details relating to all departments of labor in the State of New York, and especially in relation to the commercial, industrial, social and sanitary condition of the workingmen of the State of New York, and to the productive industries of the State of New York, for the years 1890 and 1891, and were and are the official and public records, books, papers, and documents of the Bureau of Labor Statistics of the State of New York, and the official and public records, books, papers, and documents of the people of the State of New York.

And the grand jury aforesaid further say that the public records, books, papers and documents aforesaid have been and are withheld by the said Charles F. Peck and Elbert Rodgers, and have been and were removed and mutilated by the said Charles F. Peck and Elbert Rodgers, and have been destroyed by the said Charles F. Peck and Elbert Rodgers, and have been destroyed by the said Charles F. Peck and Elbert Rodgers so that the grand jury are unable to give a better description of them than as above set forth, and so that the grand jury are unable to set them out in detail and are unable to set them out in words and figures.

And so the grand jury aforesaid charge and accuse the said Charles F. Peck, and the said Elbert Rodgers with feloniously, wilfully and unlawfully removing, mutilating, concealing and destroying public records, books, papers and documents contrary to the statute in such case made and provided.

JAMES W. EATON,

District Attorney of the County of Albany.11

[11. People v. Peck, 138 N. Y. 386, 34 N. E. 347. The indictment in this case was framed under the Penal Code, § 94, making it a crime for any person to remove, mutilate, destroy or conceal any paper or document "filed or deposited with any public officer by authority of law." The indictment was against a commissioner of statistics of labor appointed under the New York act of 1883 (chap. 356, Laws of 1883), and charged in substance that the commissioner sent out circulars calling for the statistical details mentioned in the act; that he obtained answers to such circulars written thereon, which were filed and deposited by him in his office in the capital, and that he and another, joined as defendant, wilfully and unlawfully removed, mutilated, concealed and destroyed the paper and documents thus filed and deposited. It was held that the indictment was sufficient and a demurrer thereto was improperly sustained.]

# FORM 109.

#### National Banking Law-Indictment for Violation of.

IN THE CIRCUIT COURT OF THE UNITED STATES OF AMERICA FOR THE SOUTHERN DISTRICT OF NEW YORK.

Of the December Term, in the year nineteen hundred and seven. Southern District of New York, ss.:

The grand jurors for the United States of America, impanelled and sworn in the Circuit Court of the said United States for the Southern District of New York, and inquiring for that district, upon their oath present, that Fritz Augustus Heinze, late of the borough of Manhattan, in the city of New York and in the said district, on the fourteenth day of October, in the year nineteen hundred and seven, at and within the said borough, city and district, was an officer, to wit, the president, of The Mercantile National Bank of the City of New York, which was a banking association theretofore organized and established, and then and there existing in operation and doing business, under

and by virtue of the laws of the said United States concerning national banks; and that the said Fritz Augustus Heinze then and there was lawfully authorized as such officer of the said banking association to certify checks drawn upon the same.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said Fritz Augustus Heinze, so being such officer of the said banking association and authorized to certify checks drawn upon the same as aforesaid, then and there, to wit, on the said fourteenth day of October, in the year nineteen hundred and seven, at and within the said borough of Manhattan, city of New York, and Southern District of New York, unlawfully did wilfully and knowingly, as such officer, certify a certain check which had on that day been drawn upon the said banking association by one of its depositors and dealers, to wit, the firm of Otto Heinze & Co., then consisting of certain persons, to wit, Otto C. Heinze, Arthur P. Heinze and Max H. Schultze, for the payment to the order of Gross & Kleeberg, a co-partnership consisting of Albert H. Gross and Phillip Kleeberg, of the sum of sixty-two thousand, seven hundred and sixty-one dollars and forty cents, that is to say, a check of the tenor following:

Otto Heinze & Co.

No. 1039

New York, October 14, 1907.

The Mercantile National Bank of the City of New York.

Pay to the order of Gross & Kleeberg

Sixty-two thousand seven hundred and sixty-one and 40/100 Dollars. \$62,761.40/100. Otto Heinze & Co.

Before the amount of the said check had been regularly entered to the credit of the said dealer upon the books of the said banking association, and when, as he, the said Fritz Augustus Heinze, when so certifying the same as aforesaid, there well knew, the said dealer, at the time when the said check was so certified, did not have on deposit with the said banking association an amount of money equal to the amount specified in the said check; and, further, that the said check was thereupon immediately delivered to Gross & Kleeberg aforesaid and the amount thereof in moneys, funds and credits of the said association was drawn from the said association in due course of business upon the same check; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

## Second Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Fritz Augustus Heinze, on the said fourteenth day of October, in the same year nineteen hundred and seven, at the borough of Manhattan aforesaid, in the said city of New York and Southern District of New York, was an officer, to wit, the president, of The Mercantile National Bank of the City of New York, which was a banking association theretofore

organized and established, and then and there existing and in operation and doing business, under and by virtue of the laws of the said United States concerning national banks; and that the said Fritz Augustus Heinze then and there was lawfully authorized as such officer of the said banking association to certify checks drawn upon the same.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Fritz Augustus Heinze, so being such officer of the said banking association and authorized to certify checks drawn upon the same as aforesaid, then and there, to wit, on the said fourteenth day of October, in the year nineteen hundred and seven, at and within the said borough of Manhattan, city of New York, and Southern District of New York, unlawfully did wilfully and knowingly, as such officer, certify a certain other check which had on that day been drawn upon the said banking association by one of its depositors and dealers, to wit, the said firm of Otto Heinze & Co., then consisting of certain persons, to wit, Otto C. Heinze, Arthur P. Heinze and Max H. Schultze, for the payment, to the order of H. T. Carey & Co., a co-partner-ship then and there existing, composed of individuals whose names are to the said grand jurors unknown, of the sum of twenty-one thousand four hundred and sixty-nine dollars and six cents, that is to say, a check of the tenor following:

Otto Heinze & Co.

No. 1037.

New York, October 14, 1907.

The Mercantile National Bank of the City of New York.

Pay to the order of H. T. Carey & Co.

Twenty-one thousand four hundred and sixty-nine and 06/100 Dollars. \$21,469.06/100. Otto Heinze & Co.

Before the amount of the check in this count of this indictment mentioned had been regularly entered to the credit of the said dealer upon the books of the said banking association, and when, as he, the said Fritz Augustus Heinze, when so certifying the same as aforesaid, there well knew, the said dealer, at the time when the said check was so certified, did not have on deposit with the said banking association an amount of money equal to the amount specified in the said check; and further, that the said check was thereupon immediately delivered to the said H. T. Carey & Co., and the amount thereof in moneys, funds and credits of the said association was drawn from the said association in due course of business upon the same check; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.<sup>12</sup>

[12. Counts from 3-15 inclusive, in which the same acts in respect to other checks are alleged are here omitted.]

Sixteenth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Fritz Augustus Heinze, on the said fourteenth day of

# Precedents of Forms.

October, in the same year nineteen hundred and seven, at the borough of Manhattan aforesaid, in the said city of New York and Southern District of New York, was president of The Mercantile National Bank of the City of New York, a banking association theretofore organized and established and then and there existing and in operation and doing business under and by virtue of the laws of the said United States concerning national banks; and that the said Fritz Augustus Heinze, so being president of the said banking association, then and there, with intent to injure and defraud the said banking association, certain of the moneys, funds and credits of the said banking association, then and there being, to the amount and of the value of sixtytwo thousand, seven hundred and sixty-one dollars and forty cents (the particular kinds, descriptions, numbers, amounts and values of which said moneys, funds and credits respectively the grand jurors aforesaid have no means of knowing, and therefore cannot here set forth), unlawfully did wilfully misapply, by unlawfully, wilfully, without the knowledge or consent of the said banking association, or of the directors thereof, and not for any use, benefit, gain or advantage of the said banking association, converting and applying the same moneys, funds and credits to the use, benefit, gain and advantage of certain persons then and there doing business under the firm name and style of Otto Heinze & Co., to wit, Otto C. Heinze, Arthur P. Heinze and Max H. Schultze; which said conversion and application of the said moneys, funds and credits was then and there accomplished by the said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of control, direction and management which the said Fritz Augustus Heinze, as president of the said banking association, then and there possessed over the moneys, funds and credits of the same, and over the officers and clerks of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and, as aforesaid, without the knowledge or consent of the said banking association, or of its directors, unlawfully did knowingly, wilfully and fraudulently direct the application of the credits of the said banking association, in the amount of the said sum, to the certification of a certain check, to wit, a check which had on that day been drawn upon the said banking association by the said firm of Otto Heinze & Co., for the payment of the said sum to the order of Gross & Kleeberg, a co-partnership then and there consisting of Albert H. Gross and Phillip Kleeberg, the said check then and there being of the tenor following, to wit: Otto Heinze & Co.

No. 1039.

New York, October 14, 1907.

The Mercantile National Bank of the City of New York.

Pay to the order of Gross & Kleeberg Sixty-two thousand seven hundred and sixty-one and 40/100 Dollars. \$62,761.40/100. Otto Heinze & Co.

When, as he, the said Fritz Augustus Heinze, then and there well knew, the

said firm of Otto Heinze & Co. did not have on deposit with the said banking association an amount of money equal to the amount specified in the said check, or any appreciable deposit or credit whatever; whereby, and by reason of the fact that the said check in pursuance of such direction of the said Fritz Augustus Heinze, was thereupon in fact certified in the name of the said banking association, and afterwards delivered to the said Gross & Kleeberg, and the amount thereof in moneys, funds and credits of the said banking association was paid thereon in the due course of business to the holder thereof by the said banking association, and withdrawn from the possession and control of the said banking association, and the said banking association has not been reimbursed in that amount on account thereof, the said sum then and there was wholly lost to the said banking association, and the moneys, funds and credits of the same were and are depleted in that amount; the said certification of the said check then and there having been effected, in pursuance of the said direction of the said Fritz Augustus Heinze, by one George H. Cooper, then and there a clerk of the said banking association, stamping and writing across the face of the said check the following words and figures, to wit:

Certified payable through N. Y. Clearing House, 78952, Oct. 14, '07. The Mercantile Nat. Bank, New York City. Cooper. Against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

#### Seventeenth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Fritz Augustus Heinze, on the said fourteenth day of October, in the same year nineteen hundred and seven, at the borough of Manhattan aforesaid, in the said city of New York and Southern District of New York, was president of the Mercantile National Bank of the city of New York, a banking association theretofore organized and established and then and there existing and in operation and doing business under and by virtue of the laws of the said United States concerning national banks; and that the said Fritz Augustus Heinze, so being president of the said banking association, then and there, with intent to injure and defraud the said banking association, certain other moneys, funds and credits of the said banking association then and there being, to the amount of the value of twentyone thousand four hundred and sixty-nine dollars and six cents (the particular kinds, descriptions, numbers, amounts and values of which last-mentioned moneys, funds and credits respectively the grand jurors aforesaid have no means of knowing, and therefore cannot here set forth), unlawfully did wilfully misapply, by unlawfully, wilfully, without the knowledge or consent of the said banking association, or of the directors thereof, and not for any use, benefit, gain or advantage of the said banking association, converting and applying the same moneys, funds and credits to the use, benefit, gain and advantage of certain persons then and there doing business under the firm

name and style of Otto Heinze & Co., to wit, Otto C. Heinze, Arthur P. Heinze and Max H. Schultze; which said conversion and application of the said moneys, funds and credits was then and there accomplished by the said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of control, direction and management which the said Fritz Augustus Heinze, as president of the said banking association, then and there possessed over the moneys, funds and credits of the same, and over the officers and elerks of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and, as aforesaid, without the knowledge or consent of the said banking association, or of its directors, unlawfully did knowingly, wilfully and fraudulently direct the application of the credits of the said banking association, in the amount of the said sum, to the certification of a certain other check, to wit, a check which had on that day been drawn upon the said banking association by the said firm of Otto Heinze & Co., for the payment of the said sum to the order of H. T. Carey & Co., a copartnership then and there existing, composed of individuals whose names are to the said grand jurors unknown, the said check then and there being of the tenor following, to wit:

Otto Heinze & Co.

No. 1037.

New York, October 14, 1907.

The Mercantile National Bank of the City of New York.

Pay to the order of H. T. Carey & Co. twenty-one thousand and four hundred and sixty-nine and 06/100 dollars.

\$21,469.06/100.

OTTO HEINZE & CO.

When, as he, the said Fritz Augustus Heinze, then and there well knew, the said firm of Otto Heinze & Co. did not have on deposit with the said banking association an amount of money equal to the amount specified in the said check or any appreciable deposit or credit whatever; whereby, and by reason of the fact that the said check, in pursuance of such direction of the said Fritz Augustus Heinze, was thereupon in fact certified in the name of the said banking association, and afterwards delivered to the said H. T. Carey & Co., and the amount thereof in moneys, funds and credits of the said banking association was paid thereon in the due course of business to the holder thereof, by the said banking association, and withdrawn from the possession and control of the said banking association and the said banking association has not been reimbursed in that amount on account thereof, the said sum then and there was wholly lost to the said banking association, and the moneys, funds and credits of the same were and are depleted in that amount; the said certification of the said check then and there having been affected, in pursuance of the said direction of the said Fritz Augustus Heinze, by one William H. Pangborn, then and there a clerk of the said banking assoeiation, stamping and writing across the face of the said check the following words and figures, to wit:

Certified, payable throught N. Y. Clearing House, 78953, Oct. 14, '07. The Mercantile Nat. Bank, New York City.

Against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided. 13

[13. Counts from 18-30 inclusive, in which the same acts are alleged in respect to other checks, are here omitted.]

HENRY L. STIMSON,

United States Attorney.14

[14. United States v. Heinze.]

# FORM 110.

# Perjury.

The grand jurors for the county of Boone and State of Indiana, duly and legally empanelled, charged and sworn in open court, at the November Term of the Boone Circuit Court of said State, for the year A. D. 1875, to enquire into felonies and certain misdemeanors in and for the body of said county of Boone and State aforesaid, upon their oath do present that heretofore, to wit, at the September Term of the Boone Circuit Court, in the year A. D. 1875, on the seventh day of October, A. D. 1875, at said county of Boone, before the Honorable Truman H. Palmer, sole judge of the twentieth judicial circuit of Indiana, and ex-officio judge of the said Boone Circuit Court, a certain issue between one Andrew Wallace and one William B. Walls, in a certain suit brought by said Andrew Wallace against William B. Walls, to recover off of and from said William B. Walls, money that he, the said William B. Walls, as the attorney of the said Andrew Wallace, had collected from the firm of Wilson & Shumate for said Andrew Wallace, and which he, the said William B. Walls, had failed to account to and pay over to the said Andrew Wallace, wherein the said Andrew Wallace was plaintiff and the said William B. Walls was defendant, came on to be tried in due form of law, the said court then and there having competent authority in that behalf, and the said issue was then and there tried by and before the said Honorable Truman H. Palmer, judge of said Boone Circuit Court as aforesaid, upon which said trial one William B. Walls, then and there appeared as a witness for and on behalf of the said William B. Walls, the defendant in the suit aforesaid, and was then and there duly sworn and took his corporal oath before said court, which said oath was then and there administered to the said William B. Walls by one Levi Laue, who was then and there in writing the regularly appointed deputy clerk of said court, duly qualified and acting as such, the said court, and the said Levi Laue then and there having competent author-

ity in that behalf, that the evidence which he, the said William B. Walls, should give to the court, there touching the matter then in question between the said parties, should be the truth, the whole truth, and nothing but the truth, and at and upon the trial of said issue, so joined between said parties, as aforesaid, it then and there became a material question whether one Robert Wilson, one of the members of the firm of Shumate & Wilson, had, at a certain time, to wit, March the 10th, 1873, paid said William B. Walls the sum of fifty dollars to be applied on an account he, the said William B. Walls, as the attorney of said Andrew Wallace, then and there had and held against said Wilson & Shumate for collection; and the said William B. Walls, then and there, upon the trial of said issue, upon his oath aforesaid, feloniously, wilfully, corruptly and falsely, before said court aforesaid, did depose and swear in substance and to the effect following, that is to say, that said Robert Wilson never did, at any time, ever pay him any money at all to be applied on the account of Andrew Wallace, which he, the said William B. Walls, attorney as aforesaid for said Andrew Wallace, then and there against said Wilson & Shumate had and held for collection in favor of Andrew Wallace aforesaid; whereas, in truth and in fact, said Robert Wilson did, on or about the 10th day of March, A. D. 1873, pay to said William B. Walls, attorney for said Andrew Wallace, aforesaid, the sum of fifty dollars to be applied on said account, which he, said William B. Walls, attorney for said Andrew Wallace, as aforesaid, then and there held against said firm of Wilson & Shumate, for collection as aforesaid, and so the jurors aforesaid, upon their oath aforesaid, say that the said William B. Walls, on the seventh day of October, in the year A. D. 1875, at the county aforesaid, before the Boone Circuit Court aforesaid, upon the trial aforesaid, did in manner and form aforesaid, feloniously, wilfully, corruptly and falsely commit wilful and corrupt perjury, contrary to the form of the statute in such cases made and provided, and against he peace and dignity of the State of Indiana.

"HENRY C. WILLS,

"Prosecuting Attorney."16

[16. State v. Walls, 54 Ind. 407, 408, holding the above form sufficient under a statute providing that "In indictments for perjury in a judicial proceeding, it shall only be necessary to set forth, in the indictment, the names of the parties to the suit in which the perjury is alleged to have been committed; in what court the party charged was sworn, and by whom, averring such court or officer to have competent authority; the statement sworn to together with the proper averments to falsify the matters whereof the perjury may be assigned; without setting forth any part of the proceedings, or the authority of the court or officer before whom the perjury is alleged to have been committed." 2 Ind. R. S. 1876, p. 445, § 44.

#### FORM 111.

#### Perjury.

DISTRICT COURT OF THE COUNTY OF DUBUQUE.

The State of Iowa agst. Zacharias Schill.

"The grand jury of the county of Dubuque, in the name and by the authority of the State of Iowa, accuse Zacharias Schill of the crime of perjury, committed as follows:

The said Zacharias Schill, heretofore, to wit, on the seventeenth day of February, A. D. 1868, in the county aforesaid, in a criminal investigation then pending before the grand jury of said county, wherein one William Meyer, a justice of the peace of said county, was charged with oppression in office, which said matter the said grand jury then and there had lawful power and authority to investigate, and he, the said Zacharias Schill then and there before the said grand jury, in due form of law, was sworn by John Palmer, then and there the foreman of the said grand jury, and took his corporal oath the truth to speak concerning the matters charged against the said William Meyer, he, the said John Palmer, foreman of the said grand jury, then and there having lawful power and authority to administer the said oath to the said Zacharias Schill in that behalf; and the said Zacharias Schill, being so duly sworn as aforesaid, then and there, upon his oath aforesaid, before the grand jury aforesaid, falsely, wilfully, corruptly and feloniously did depose and swear, in substance and to the effect following: I was arrested by a constable who had a warrant against me, and was brought before Justice Meyer. In the office there was a young woman named Anna Lillie; the justice asked me if I knew the woman; I said I knew her; Justice Meyer then asked me if I was ready to marry this woman; I said I would not do such a thing; the justice said I must marry the woman Lillie, before I left the room, or pay a fine of \$1,000, and be imprisoned in the penitentiary for five years. "The justice then told me to stand up, take my place by the side of the woman. After I had done this Mr. Meyer took my hand and by force placed it in the hand of the woman. The justice then said some word in English to me, which I could not understand; the justice then said to me in German, 'You are now married to this woman,' whereas, in truth and in fact, the said Justice Meyer did never at any time tell the said Zacharias that he must marry the woman, Lillie, before he left the room, as he, the said Zacharias Schill, then and there well knew, and did not at any time tell the said Zacharias Schill that if he did not marry the woman, Lillie, he would have to pay a fine of \$1,000 and be imprisoned in the penitentiary for five years, as he, the said Zacharias Schill, then and there well knew, and whereas, the said Justice Meyer did never at any time take the hand of said Zacharias Schill by force and place it in the hand of the woman, as he, the said Zacharias Schill, then and there well knew, which said matter, so sworn to before the said grand jury by the said Zacharias Schill was material matter in the investigation then going on before the grand jury in reference to the charge of oppression in office by

the said William Meyer, then and there being heard by the grand jury." And so the grand jury of the county of Dubuque, in the name and by the authority of the State of Iowa, do say that the said Zacharias Schill, on the 17th day of February, A. D. 1868, at Dubuque county, aforesaid, before the grand jury of the said county, by his own act and consent, in manner and form aforesaid, falsely, wilfully, corruptly and feloniously did commit wilful and corrupt perjury.

"M. M. TRUMBULL,

"District Attorney in and for the 9th Judicial District."17

[17. State v. Schill, 27 Iowa, 263, holding that in an indictment for perjury for false swearing in a criminal investigation before a grand jury, it is not necessary to allege that the party charged with the offense that was under investigation before the grand jury was or was not guilty thereof, nor the facts constituting such offense, and also holding that under the statute, § 4659, the indictment is sufficient when the act charged as the offense is stated with such a degree of certainty, and in such a manner as to enable a person of common understanding to know what is intended, and the court to pronounce judgment.]

#### FORM 112.

#### Perjury.

STATE OF MARYLAND, WASHINGTON COUNTY, TO WIT:

The jurors of the State of Maryland, for the body of Washington county, do on their oaths present, that heretofore, to wit, on the 11th day of July, 1872, the Honorable William Motter, associate judge of the Circuit Court for Washington county, by the authority vested in him by the constitution and laws of the said State, upon the petition and application of a certain J. Clarence Mobley, ordered that the State's writ of habeas corpus issue out of the said Circuit court for Washington county, directed to Robert C. Bamford, the sheriff of the said county, commanding him, the said sheriff, to produce the body of the said J. Clarence Mobley, held in confinement by him, together with the cause of the detention of him, the said J. Clarence Mobley, and that the said writ of habeas corpus be returned immediately at the basement of the Methodist Episcopal Church in Hagerstown, before the Honorable William Motter, associate judge as aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said writ of habeas corpus did issue as ordered by the said judge, directed to the said Robert C. Bamford, sheriff as aforesaid; and the said sheriff, according to the exigency of the said writ did produce the body of the said J. Clarence Mobley, with the cause of his detention and confinement, before the said William Motter, associate judge of the Circuit Court for Washington county as aforesaid, at the basement of the said Methodist Episcopal Church in Hagerstown, on the said 11th of July, 1872.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Clarence Mobley, produced as aforesaid, by the sheriff aforesaid, before the Honorable William Motter, associate judge as aforesaid, did on his own behalf and by his counsel, plead that he, the said J. Clarence Mobley, did commit no offense, and that there was no sufficient legal cause for his detention and confinement by the said sheriff as aforesaid; and that the said judge did then and there, to wit, on the said 11th of July, 1872, inquire into the legality, cause and propriety of the confinement and detention of the said J. Clarence Mobley, as aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present, that while the said judge was inquiring into the legality, cause and propriety of the confinement and detention of the said J. Clarence Mobley as aforesaid, one John C. Deckard, late of Washington county aforesaid, yeoman, did then and there, to wit, on the said 11th of July, 1872, at Washington county aforesaid, appear before the said judge as a witness in support of the legality of the said confinement and detention of the said J. Clarence Mobley, and did then and there, before the said Honorable William Motter, associate judge as aforesaid, in due form of law, solemnly and sincerely declare and affirm, that the evidence that he, the said John C. Deckard, should give in the matter depending before the court (the legality and propriety of the confinement and detention of the said J. Clarence Mobley as aforesaid, then and there depending before the said Judge and court), should be the truth, the whole truth and nothing but the truth; he, the said Honorable William Motter. judge as aforesaid, then and there having sufficient and competent authority to administer the said affirmation to the said John C. Deckard, in behalf. said John C. Deckard having aforesaid then and there, to wit, on the said 11th day of July, 1872, at Washington county aforesaid, to prevent the said judge of the said court, from knowing the truth, and to continue the imprisonment and detention of the said J. Clarence Mobley, did, upon his affirmation, in answer to the question propounded to him in the matter then and there depending before the said judge of the said court (the said judge of the said court having then and there sufficient and competent authority to administer an affirmation to the said John C. Deckard, and to propound, and to permit to be propounded, questions on that behalf to him), then and there wilfully, falsely, corruptly and knowingly, by his own act and consent, commit perjury upon his affirmation, in saying, deposing, affirming and declaring in answer to the question propounded as aforesaid (amongst other things) in substance to the effect following, that is to say, that the said J. Clarence Mobley, Daniel Ward, Jacob H. Zook, Joseph Bombarger, Oliver Ridenour, George Dusang, John Wright, John W. Adams and James Pickett, five or six weeks ago (meaning five or six weeks before the time of making said affirmation), on one night, about nine or ten o'clock, did enter together into the saloon of Daniel Ward, kept in the house of James Pickett, and having entered into the said saloon as aforesaid, some one of the above named persons in the said saloon said, "Let us

break down Deckard, let us swear against him," and that the others of the above-named persons agreed, and assented to the same, and that they did then and there enter into a conspiracy against him, the said John C. Deckard; whereas, in truth and in fact, the said J. Clarence Mobley, Daniel Ward, Jacob H. Zook, Joseph Bombarger, Oliver Ridenour, George Dusang, John Wright, John W. Adams and James Pickett, did not enter together into the said saloon of Daniel Ward, kept in the house of the said James Pickett, at the time alleged by the said John C. Deckard in his said affirmation, or at any other time, and whereas, in fact and in truth, the above-named persons were not together in the said saloon nor did any one of them say to the others, "Let us break Deckard down, let us swear against him;" nor did they or any of them then and there give any assent to the same, or agreed to do the same, or enter into a conspiracy against him, the said John C. Deckard.

And the jurors aforesaid, upon their oath aforesaid, do further present, that it then and there became necessary and material that the said judge of the said court should know whether the said J. Clarence Mobley, Daniel Ward, Jacob H. Zook, Joseph Bombarger, Oliver Ridenour, George Dusang, John Wright, John W. Adams and James Pickett, did enter together the said saloon five or six weeks before the making of the said affirmation by the said John C. Deckard, and whether, having entered as aforesaid, they did then and there, in the said saloon, agree to break down Deckard and swear against him, and did then and there enter into a conspiracy against him.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said John C. Deckard, on the said 11th day of July, 1872, at Washington county aforesaid, before the said judge of the said court (he, the said judge, then and there having sufficient and competent authority as aforesaid), upon his solemn affirmation aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in a matter depending before the said judge of the Circuit Court for Washington county, did wilfully, corruptly, falsely and knowingly commit perjury, contrary to the form of the act of Assembly in such case made and provided, and against the peace, government and dignity of the State. 19

[18. Deckard v. State, 38 Md. 186, 188, holding that the averments sufficiently showed that the inquiry instituted by the judge into the legality, cause and propriety of the confinement and detention of the person named was a judicial proceeding before a competent jurisdiction; that the materiality of the false testimony to the subject of inquiry was sufficiently averred; and that the statement that the affirmation was made in a matter "pending before the court" instead of in a matter of pending before the judge was a departure in matter not of substance but of form merely.]

# FORM 113.

#### Perjury.

STATE OF MISSOURI, COUNTY OF SCOTT, SS.:

In the Circuit Court of Scott County, Missouri, April Term, 1883:

The grand jurors for the State of Missouri, duly empanelled, sworn and charged to inquire within and for the county of Scott aforesaid, upon their oath, present that, heretofore, at one of the justice of the peace courts of Richland township, in said county and State, on the eleventh day of January, 1883, before William Boutwell, Esquire, one of the justices of the peace of said township in said county and State, a certain issue between one James Marshall and one John D. Ebert, in a certain action to recover money had, received and paid out, by mistake or oppression, wherein the said James Marshall was plaintiff, and the said John D. Ebert was defendant, came on to be tried in due form of law, the said court then and there having competent authority in that behalf, and the said issue was then and there tried by the said justice of the peace, sitting as a court as aforesaid in that behalf, upon which said trial one William R. Huckeby then and there appeared as a witness for and in behalf of the said John D. Ebert, the said defendant in the action aforesaid, and was then and there duly sworn, and took his oath before the said court, which said oath was then and there administered by the said William Boutwell, Esquire, justice of the peace as aforesaid, then and there sitcourt as aforesaid, then and  $_{
m there}$ having full competent authority to administer the said oath to that behalf, that the evidence R. Huckeby in which the said William Huckeby, should give to the court then and be the truth, the whole truth, and nothing should but the truth, and that upon the trial of the issue so jointed between the parties aforesaid, it then and there became, and was, a material question whether the said James Marshall had bought of the said John D. Ebert, at his store in the town of Sikeston, in said county and State, on the twentieth day of January, 1882, certain goods, wares and merchandise, amounting in price and value to \$4.90, itemized as follows: Calico of the price and value of one dollar; one pair of shoes for ninety cents; one pair of shoes for seventyfive cents; eight yards of prints for one dollar and sixty cents, and checks for sixty-five cents, and that the said William R. Huckeby then and there on the trial of said issue upon his oath aforesaid, feloniously, wilfully, corruptly, and falsely, before the court aforesaid, did depose and swear in substance and to the effect following, that is to say: That the said James Marshall, on the twentieth day of January, 1882, did buy of the said John D. Ebert, at his store in said town of Sikeston, aforesaid calico at the price of one dollar, one pair of shoes for seventy-five cents, one pair of shoes for ninety cents, eight vards of prints for one dollar and sixty cents, and checks for sixty-five cents, saving: I (meaning myself), say this is the James Marshall (meaning the said James Marshall then and there at the time being the plaintiff in the

cause of action aforesaid), who got these goods (meaning the calico, shoes, checks and prints aforesaid), the said William R. Huckeby then and there well knowing that the said James Marshall, the plaintiff in said action, was not the person who bought said articles of goods, wares and merchandise of the said John D. Ebert, the defendant in said action, at his store in said town of Sikeston, on the twentieth day of January, 1882, and that the said William R. Huckeby then and there knew that the said testimony by him given, under oath as aforesaid, to be false and corrupt; whereas, in truth and in fact, the said James Marshall did not buy said articles of goods, wares and merchandise, to wit: the said calico, shoes, prints and checks, amounting to four dollars and ninety cents, but that one James H. Marshall did buy said calico, shoes, prints and checks, for the price of four dollars and ninety cents aforesaid, at the time and place aforesaid, and of the said John D. Ebert aforesaid. And so the grand jurors aforesaid, upon their oath aforesaid, say that the said William R. Huckeby, on the said 11th day of January, 1883, at the county and State aforesaid, before the court aforesaid, upon the trial aforesaid, did in manner and form aforesaid, feloniously, wilfully, corruptly, and falsely commit wilful and corrupt perjury against the peace and dignity of the State.

# ALBERT DE REIGN, Prosecuting Attorney.<sup>19</sup>

TO THE REPORT OF THE

[19. State v. Huckeby, 87 Mo. 414, 415, holding that an indictment is sufficient which names and particularizes the cause in which the alleged perjury was committed, and the court in which the case was tried, avers the materiality of the issue so that the court can determine as to its materiality, avers that the oath was administered by one of competent authority, and sets out the facts alleged to have been sworn to, negatives their truth, and them properly assigns perjury upon them.]

# FORM 114.

#### Perjury.

The grand inquest of the State of New Jersey, in and for the body of the county of Bergen, upon their respective oaths present, that heretofore, to wit, at the Circuit Court holden at the township of New Barbadoes, within and for the said county of Bergen, on the eighth day of December, in the year of our Lord one thousand eight hundred and eighty-seven, before Jonathan Dixon, Esquire, then being a justice of the Supreme Court of Judicature of the State of New Jersey, and holding then and there the Circuit Court in and for the county aforesaid, a certain issue duly joined in the said court between The First National Bank of Hackensack and one Richard P. Terhune, in a certain plea of contract, came on to be tried in due form of law, and was then and there tried by a certain jury of the country, duly summoned, em-

panelled and sworn, between the parties aforesaid; and that upon the said trial Charles H. Voorhis, late of the township aforesaid, in the county aforesaid, appeared as a writness on behalf of the said First National Bank of Hackensack, the plaintiff, and was duly sworn and took his corporal oath upon the Holy Gospel of God, administered by Samuel Taylor, then the duly qualified clerk of the Circuit Court aforesaid, before the said Jonathan Dixon, Esquire, justice as aforesaid, to speak the truth, the whole truth, and nothing but the truth, touching the matters in issue on the said trial, he, the said Samuel Taylor, clerk as aforesaid, having sufficient and competent power and authority to administer the said oath to the said Charles H. Voorhis in that behalf, before the said Jonathan Dixon, Esquire, justice as aforesaid; and that at and upon said trial certain questions became and were material in substance as follows, that is to say, whether the said The First National Bank of Hackensack theretofore had taken, received, obtained or withheld from the said Richard P. Terhune, for divers sums of money theretofore had and received of and from the said The First National Bank of Hackensack by the said Richard P. Terhune, above the value of six dollars for the forbearance of one hundred dollars for a year, or at that rate, and that the said Charles H. Voorhis, being so sworn as aforesaid, and being then and there lawfully required to depose the truth in the proceeding and suit aforesaid, at and upon the said trial of the proceeding and suit aforesaid, at the court aforesaid, then and there wilfully, corruptly, falsely and knowingly did say, depose and swear, among other things, in substance and to the effect following, that is to say, "This bank never charged more than six per cent.," meaning thereby that the said The First National Bank of Hackensack had not theretofore had, taken, received, obtained or withheld from the said Richard P. Terhune, for divers sums of money theretofore had and received of and from the said The First National Bank of Hackensack by the said Richard P. Terhune, above the value of six dollars for the forbearance of one hundred dollars for a year, or at that rate; whereas, in truth and in fact, the said The First National Bank of Hackensack had theretofore taken, received, obtained and withheld from the said Richard P. Terhune, for divers sums of money theretofore had and received of and from the said The First National Bank of Hackensack by the said Richard P. Terhune, above the value of six dollars for the forbearance of one hundred dollars for a year, or at that rate, as the said Charles H. Voorhis then and there well knew.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Charles H. Voorhis, in manner and form aforesaid, did commit wilful and corrupt perjury, against the form of the statute in such case made and provided, against the peace of this State, the government and dignity of the same.

And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, at the Circuit Court holden at the township of New Barbadoes, within and for the said county of Bergen, and within the jurisdiction of this court, on the eighth day of December, in the year of our Lord

one thousand eight hundred and eighty-seven, before Jonathan Dixon, Esquire, then being a justice of the Supreme Court of Judicature of the State of New Jersey, and holding then and there the Circuit Court in and for the county aforesaid, a certain issue duly joined in the said court between The First National Bank of Hackensack and one Richard P. Terhune, in a certain plea of contract, came on to be tried in due form of law, and was then and there tried by a certain jury of the county, duly summoned, empanelled and sworn between the parties aforesaid; and that upon the said trial, Charles H. Voorhis, late of the township aforesaid, in the county aforesaid, appeared as a witness on behalf of the said The First National Bank of Hackensack, the plaintiff, and was duly sworn and took his corporal oath upon the Holy Gospel of God, before the said Jonathan Dixon, Esquire, justice as aforesaid, to speak the truth, the whole truth, and nothing but the truth, touching the matters in issue of the said trial, he, the said Jonathan Dixon, Esquire, justice as aforesaid, having sufficient and competent power and authority to administer the said oath to the said Charles H. Voorhis in that behalf; and that at and upon said trial certain questions became and were material in substance as follows, that is to say, whether the said The First National Bank of Hackensack theretofore had taken, received, obtained, withheld from or charged to the said Richard P. Terhune, for divers sums of money theretofore had and received of and from the said The First National Bank of Hackensack by the said Richard P. Terhune, above the value of six dollars for the forbearance of one hundred dollars for a year, or at that rate, and that the said Charles H. Voorhis, being so sworn as aforesaid, and being then and there lawfully required to depose the truth in the proceeding and suit at law aforesaid, at and upon the said trial of the proceeding and suit at law aforesaid, at the court aforesaid, then and there wilfully, corruptly, falsely and knowingly did say, depose and swear, among other things, in substance and to the effect following, that is to say, "This bank never charged more than six per cent.," meaning thereby that the said The First National Bank of Hackensack had not theretofore had, taken, received, obtained, withheld from or charged to the said Richard P. Terhune, for divers sums of money theretofore had and received of and from the said The First National Bank of Hackensack by the said Richard P. Terhune, above the value of six dollars for the forbearance of one hundred dollars for a year, or at that rate; whereas, in truth and in fact, the said The First National Bank of Hackensack had theretofore taken, received, obtained, withheld from and charged to the said Richard P. Terhune, for divers sums of money theretofore had and received of and from the said The First National Bank of Hackensack by the said Richard P. Terhune, above the value of six dollars for the forbearance of one hundred dollars for a year, or at that rate, as the said Charles H. Voorhis then and there well knew.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Charles H. Voorhis, in manner and form aforesaid, did commit wilful and corrupt perjury, against the form of the statute in such case made and pro-

## Precedents of Forms.

vided, against the peace of this State, the government and dignity of the same.20

[20. State v. Voorhis, 52 N. J. L. 351, 352, denying a motion to quash the above indictment on the ground that it failed to set forth an indictable offense with the requisite legal certainty.]

# FORM 115.

#### Perjury.

COURT OF GENERAL SESSIONS OF THE PEACE In and for the County of New York.

The People of the State of New York against Robert L. Martin and Harry Velthusen.

The grand jury of the county of New York, by this indictment, accuse Robert L. Martin and Harry Velthusen of the crime of perjury, committed as follows:

Heretofore, to wit, on the 15th day of May, in the year of our Lord one thousand nine hundred and one, the said Robert L. Martin and the said Harry Velthusen, each late of the borough of Manhattan, of the city of New York, in the county of New York aforesaid, were respectively the said Robert L. Martin, president, and Harry Velthusen, secretary of the Delaware Surety Company, a corporation duly organized and existing under the laws of the State of Delaware.

And then and there and on the day and year aforesaid it was required by law and by the general corporation law of the State of Delaware that the president, with the secretary or treasurer, of every corporation organized and existing under the laws of the said State of Delaware should, upon payment of the capital stock of such corporation, make a certificate stating whether the same had been paid in cash or by the purchase of property, and stating also the total amount of capital stock paid in, which certificate should be signed and sworn, or affirmed to by the president and secretary, or treasurer, and further providing that the same said certificate, so signed and sworn, or affirmed to, should be filed in the office of the Secretary of State of the said State of Delaware.

And then and there and on the said 15th day of May, in the year aforesaid, one Thomas Adam, Jr., was a notary public duly appointed, sworn and qualified in and for the county of New York, aforesaid, and thereby duly authorized and empowered to administer oaths and take affidavits.

And then and there, and on the said 15th day of May, in the year aforesaid, at the borough and county aforesaid, the said Robert L. Martin, as president, as aforesaid, of the said corporation, as aforesaid, and Harry Velthusen, as secretary of the said corporation aforesaid, appeared before the said Thomas Adam, Jr., notary public as aforesaid, and did then and there, each in his

own proper handwriting duly subscribed, the said Robert L. Martin, as president, and the said Harry Velthusen, as secretary, the certain certificate, so as aforesaid required and provided for by law, and by the said general corporation law of the said State of Delaware, which said certificate was then and there as follows, to wit:

We, Robert L. Martin, president, and Harry Velthusen, secretary, of the Delaware Surety Company, a corporation created by and under the laws of the State of Delaware, do hereby

Certify that the entire capital stock of the Delaware Surety Company, said corporation, of one million dollars, has been paid in cash.

New York, May 15, 1901.

DELAWARE SURETY COMPANY.

By ROBERT L. MARTIN, President.

HARRY VELTHUSEN, Secretary.

Delaware Surety Company, Incorporated, 1901.

(Ten cent revenue stamp cancelled.)

And did then and there produce, present and exhibit the same said written instrument and certificate as aforesaid to the said Thomas Adam, Jr., notary public as aforesaid, and he, the said Robert L. Martin, and he, the said Harry Velthusen, did then and there, at the borough and county aforesaid, on the said 15th day of May, in the year aforesaid, produce, present and exhibit to the said Thomas Adam, Jr., notary public as aforesaid, a certain affidavit in writing, duly signed and subscribed by him, the said Robert L. Martin, in his own proper handwriting, touching the truth of the said certificate aforesaid, so subscribed by them, the said Robert L. Martin and the said Harry Velthusen, as aforesaid, which said affidavit in writing was then and there as follows, to wit:

STATE OF NEW YORK, COUNTY OF NEW YORK, SS .:

Robert L. Martin and Harry Velthusen, being severally duly sworn, depose and say, each for himself: That they have read the foregoing certificate and know the contents thereof, and the same is true to their own knowledge.

> ROBERT L. MARTIN. HARRY VELTHUSEN.

Sworn to before me this 15th day of May, 1901.

THOMAS ADAM, Jr.,

Notary Public, New York County. THOMAS ADAM, Jr.,

Notary Public, New York County.

And it was then and there, and on the said 15th day of May, in the year aforesaid, required and provided for by law, and by the said general corporation law of the said State of Delaware, that the said certificate, so made, signed and subscribed by the said Robert L. Martin, as president as aforesaid, and the said Harry Velthusen, as such secretary, as aforesaid, should be

sworn or affirmed to by each of them before the same should be filed in the office of the Secretary of the said State of Delaware;

And thereupon, and at the time and place aforesaid, and on the day aforesaid, before Thomas Adam, Jr., such notary public as aforesaid, at the borough and county aforesaid, the said Robert L. Martin was duly sworn and did take his corporal oath by and before the said Thomas Adam, Jr., such notary public aforesaid, touching the truth of the matters contained in the said affidavits, so as aforesaid, in writing, and subscribed by him, the said Robert L. Martin, the said Thomas Adam, Jr., such notary public, having full and competent authority and power to administer such oath to them, and each of them, in that behalf;

And the said Robert L. Martin, being so sworn as aforesaid, upon his corporal oath aforesaid, did then and there, and by the said affidavit in writing, so signed and subscribed by him as aforesaid, falsely, corruptly and knowingly swear and depose that each and every matter therein stated was true to his own knowledge;

And thereupon, and on the day and in the year aforesaid, at the borough and county aforesaid, the said Robert L. Martin did deliver the said certificate and the said affidavit, so as aforesaid signed, subscribed and sworn to by him, the said Robert L. Martin, to another, with intent that it be uttered and published as true; and the same said certificate and affidavit were thereafter filed in the office of the Secretary of State of the said State of Delaware, the said affidavit having been signed and sworn to by the said Harry Velthusen, the said secretary of the said corporation, who had theretofore, as aforesaid, subscribed the said certificate.

Whereas, in truth and in fact, there was not then and there, and there had not been paid in in cash, one million dollars, as, in and for payment of the capital stock of the said Delaware Surety Company, the said corporation as aforesaid, as they, the said Robert L. Martin and the said Harry Velthusen, and for each of them, then and there well knew;

And whereas, in truth and in fact, the said Robert L. Martin did not then and there know that there was or had been paid in, in cash, one million dollars as in and for payment of the capital stock of the said Delaware Surety Company, the said corporation as aforesaid, as they, the said Robert L. Martin and Harry Velthusen, then and there well knew;

And the said Harry Velthusen then and there, and at all the times aforesaid, at the said borough and county aforesaid, and on the day aforesaid, was actually present, aiding, counselling, advising and procuring the said acts, oaths and wilful perjury, as aforesaid, on the part of the said Robert L. Martin.

And so the grand jury aforesaid do say that the said Robert L. Martin and the said Harry Velthusen, in the manner and form aforesaid, and by the means aforesaid, did wilfully, feloniously, corruptly, knowingly and falsely commit the crime of wilful and corrupt perjury, against the form of

the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

EUGENE A. PHILBIN,
District Attorney.21

[21. People v. Martin, 175 N. Y. 315, 67 N. E. 589, affig 77 App. Div. (N. Y.) 397, which held that the above indictment did not charge two offenses but the commission of a single offense in which the two defendants were principals.]

# FORM 116.

#### Perjury.

#### LEWIS COUNTY, SS.:

The jurors of the people of the State of New York, in and for the body of the county of Lewis, to wit (reciting the names of the jurors), good and lawful men of the said county of Lewis, then and there being sworn and charged to inquire for the people of the State of New York, and for the body of the county of Lewis, do, upon their oath, present: That heretofore, to wit, on the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and fifty-three at a County Court of the said county of Lewis, holden at the court house in Martinsburgh, in and for said county of Lewis, by and before the Honorable Francis Seger, then county judge of said county of Lewis and judge of said court, one James Catillay, who was then and there an alien and subject of the government of Germany, and not a citizen of the United States, made application to said court, and made and filed and presented his declaration in writing and on oath in open court, of his intention to become a citizen of the United States in due form of law, and said County Court had full and perfect jurisdiction and authority over the subject matter of said application, and that the said James Catillay did then and there apply to and petition said court to be naturalized and to become a citizen of the United States, and that at the said County Court last aforesaid, which was a court of record, to wit, on the twenty-seventh day of September aforesaid, on said petition and application, it then and there became and was a material question whether the said James Catillay had then and there resided within the limits and under the jurisdiction of the United States for five years then last past, and whether the said James Catillay, for one year then last past had resided within the State of New York, and whether, during the same period, the said James Catillay had behaved himself as a man of good moral character, attached to the principals of the Constitution of the United States, and well disposed to the good order and happiness of the same, and whether, at the time the said James Catillay arrived in the United States, he had attained his eighteenth year; and the jurors aforesaid, upon their oath aforesaid, do further present, that Patrick Sweetman, late of the

town of Croghan, heretofore, to wit, on the said twenty-seventh day of September, in the year of our Lord one thousand eight hundred and fifty-three, to wit, at said County Court, to wit, at Martinsburgh, in said county of Lewis, wickedly, maliciously, unlawfully and feloniously contriving and intending unjustly, fraudulently, feloniously and unlawfully to procure the naturalization of the said James Catillay, an alien as aforesaid, and to procure his admission as a citizen of the United States, came in his proper person before the said County Court, to wit, before the said Francis Seger, county judge as aforesaid, and then and there in open court produced a certain affidavit, in writing, of him, the said Patrick Sweetman, and then and there in open court, before Harrison Barnes, who was then and there county clerk of said county of Lewis, and clerk of said County Court, in due form of law, was sworn and took his corporal oath upon the Holy Gospel of God, concerning the truth of the matter contained in the said affidavit, he, the said Harrison Barnes, clerk as aforesaid, then and there having lawful and competent power and authority to administer the said oath to the Patrick Sweetman in that behalf and that the said Patrick Sweetman, being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there in open court, upon his oath aforesaid, before the said Harrison Barnes, clerk as aforesaid, the said Harrison Barnes then and there having lawful and competent power and authority to administer the said oath to the said Patrick Sweetman in that behalf, falsely, corruptly, knowingly, wilfully and maliciously, in and by his said affidavit in writing, did depose and swear, among other things, in substance and to the effect following, that is to say: That James Catillay, meaning the said James Catillay above mentioned, had resided within the limits and under the jurisdiction of the United States for five years then last past, and for one year then last past within the State of New York, and that during the same period he had behaved himself as a man of good moral character, attached to the principals of the Constitution of the United States, and well disposed to the good order and happiness of the same; and that at the time the said James Catillay arrived in the United States he had not attained his eighteenth year, as in and by the said affidavit of the said Patrick Sweetman, filed in the county clerk's office of the said county of Lewis more fully and at large appears, which affidavit is in the words and figures following, that is to say:

STATE OF NEW YORK, LEWIS COUNTY, SS.:

Patrick Sweetman, of said county, being duly sworn, doth depose and say: That he is a citizen of the United States; that he is well acquainted with the above named James Catillay, and that the said James Catillay has resided within the limits and under the jurisdiction of the United States for five years last past, and for one year last past within the State of New York; and that during the same period he has behaved himself as a man of good moral character, attached to the principals of the Constitution of the United

States, and well disposed to the good order and happiness of the same. And he further saith, that at the time the said James Catillay arrived in the United States he had not attained his eighteenth year.

PATRICK SWEETMAN.

Sworn in open court, the 27th day September, 1853, before me.

H. BARNES, Clerk.

Whereas, in truth and in fact, the said James Catillay, at the time the said Patrick Sweetman took his said oath and made his affidavit aforesaid, had no residence within the limits and under the jurisdiction of the United States for five years then last past and for one year last past within the State of New York; and whereas, in truth and in fact, the said James Catillay, during the same period, had not behaved himself as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and whereas, at the time the said James Catillay arrived in the United States he had attained his eighteenth year; and whereas, the same affidavit was in all respects utterly false and untrue at the time the said Patrick Sweetman so made and swore to the same; and whereas, the said Patrick Sweetman, at the time he so swore to and made the same, well knew the same to be utterly false and untrue; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Patrick Sweetman, on the twenty-seventh day of September, in the year last aforesaid, to wit, at Martinsburgh, in the county aforesaid, at the said County Court aforesaid, in open court, which had full and competent jurisdiction over the subject matter of said application, before the said Harrison Barnes, clerk of said county and court as aforesaid (the said Harrison Barnes, clerk as aforesaid, then and there having such power and authority as aforesaid), by his own act and consent and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully and corruptly, did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of the people of the State of New York, and their laws, to the evil and pernicious example of all others in like case offending, and against the peace of all people of the State of New York and their dignity.

> E. S. MERRILL, District Attorney.<sup>22</sup>

[22. People v. Sweetman, 3 Park. Cr. R. (N. Y.) 358, 359. Form used in this case for perjury in a proceeding to obtain naturalization of an alien.]

# FORM 117.

#### Perjury.

STATE OF TENNESSEE, COUNTY OF JEFFERSON—CIRCUIT COURT, APRIL TERM, 1877.

The grand jurors for the State of Tennessee, having been duly summoned, elected, impanelled, sworn and charged to inquire for the body of the county aforesaid, upon their oath aforesaid, present that Edward Lawson, late of said county, laborer, on the 10th day of December, eighteen hundred and seventy-six, in the State and county aforesaid, feloniously, wilfully, maliciously, deliberately, absolutely and corruptly swore falsely to a certain matter, as follows, before the grand jury of the Circuit Court then and there being held for the county and State aforesaid, by the Hon. James G. Rose, judge of the Second Judicial Court of the State of Tennessee, duly elected by the qualified voters thereof, and commissioned by the Governor of said State, and the grand jury was then and there in session under the control and supervision of the said Hon, James G. Rose, within and before whom it became and was material to inquire whether or not any one within the limits of the county aforesaid had been guilty of selling whiskey without first having appeared before the County Court clerk and entering into bond and taking and subscribing to the oath, as the provisions of the act of Assembly require, and the said Edward Lawson being then and there sworn by Ed. R. Hall, foreman of the said grand jury, under the direction and by the command of the said judge, he, the said Ed. R. Hall, foreman as aforesaid, having lawful authority to administer oaths on the holy evangelists of Almighty God the truth to speak. the whole truth and nothing but the truth, before said grand jury, when, having first been sworn by Ed. R. Hall, foreman as aforesaid, the said Edward Lawson feloniously, wilfully, deliberately, absolutely and corruptly swore then and there before the grand jury aforesaid, that he, the said Edward Lawson, had bought one pint of whiskey from one Fanny Chambers, and that he, the said Edward Lawson, had paid her, the said Fanny Chambers, fifty cents for said pint of whiskey, and which said swearing was material to the point under investigation by the said grand jury, and was knowingly, maliciously, feloniously, wilfully, deliberately, absolutely and corruptly false, and the said Edward Lawson then and there well knew the same to be false in point of fact when he deposed to it. And so the said grand jurors aforesaid. upon their oath aforesaid, do present and say that the said Edward Lawson. on the day and year last aforesaid, in the State and county aforesaid, in the manner and form aforesaid, and by the means of the false swearing aforesaid was guilty of felonious, wilful, deliberate, malicious, absolute and corrupt perjury, to the evil example of all like offenders, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

And the jurors aforesaid, upon their oath aforesaid, do further present,

that Edward Lawson, on the 8th day of April, 1877, in the State and county aforesaid, feloniously, wilfully, maliciously, deliberately, absolutely and corruptly swore falsely to a certain matter as follows: A certain lawsuit or trial, wherein the State of Tennessee was plaintiff and Fanny Chambers was defendant, was pending and came on for trial, and was tried at the April term, 1877, in the Circuit Court for the county of Jefferson aforesaid, before the Hon. James G. Rose, judge, etc., for the Second Judicial Circuit of the State of Tennessee, duly elected by the qualified voters thereof, and commissioned by the Governor of said State, and before a jury duly elected, impanelled and sworn to try the issue in said cause, and the said lawsuit or trial was within the jurisdiction of said Circuit Court, wherein and on the trial of said cause it became and was material to inquire whether or not the said Fanny Chambers had sold, for a valuable consideration, any whiskey, contrary to the provisions of the act of Assembly, and the said Edward Lawson being then and there sworn, on behalf of the plaintiff in said cause, by W. P. Hoskins, clerk of said Circuit Court, under the direction and by the command of the said judge, he, the said W. P. Hoskins, having lawful authority to administer oaths, on the holy evangelists of Almighty God, the truth to speak, the whole truth and nothing but the truth, on said trial. when, having first been so sworn, the said Edward Lawson feloniously, wilfully, deliberately, absolutely and corruptly swore that he, the said Edward Lawson, had got a pint of whiskey from her, the said Fanny Chambers, but that he had not paid her, the said Fanny Chambers, therefor, nor did he promise to pay her for the same, which said swearing was material to the point at issue on said trial, and was knowingly, maliciously, feloniously, wilfully, deliberately, absolutely and corruptly false, and the said Edward Lawson then and there well knew the same to be false in point of fact when he deposed to it. And so the grand jurors aforesaid, upon their oath aforesaid, do present and say that the said Edward Lawson, on the day and year last aforesaid, in the State and county aforesaid, in the manner and form as aforesaid, and by means of the false swearing, was guilty of felonious, wilful, deliberate, malicious, absolute and corrupt perjury, to the evil example of all like offenders, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

> JNO. B. MEEK, District Attorney, pro tem.<sup>23</sup>

[23. Lawson v. State, 71 Tenn. 309, holding that at common law the general averment that the defendant swore falsely would not be sufficient, it being deemed essential that the words of the false swearing should be expressly and in terms contradicted but that under the statutes the prolixity of the common law form had been simplified and abbreviated.]

#### FORM 118.

# Perjury-By President of Corporation.

"In the Name and by the Authority of the State of Texas.

The grand jurors of Travis county, in said State, duly empanelled, sworn and charged as such at the September Term, A. D. 1906, of the District Court of said county, in and for the Fifty-third Judicial District, upon their oaths, in said court, present: That Henry Clay Pierce, in said county and State, on or about the 31st day of May, in the year of our Lord nineteen hundred, and before the presentment of this indictment, did then and there present himself and make his personal appearance before N. H. Nagle, a duly and legally qualified and acting notary public within and for the county of Travis and State of Texas, who was then and there duly authorized by law as such officer and notary public to administer an oath; and the said Henry Clay Pierce, having been duly sworn by the said N. H. Nagle, acting in her capacity as such officer and notary public, did then and there unlawfully, deliberately, corruptly and wilfully, under the sanction of the oath so legally administered to him by the said N. H. Nagle, acting in the capacity aforesaid, make his voluntary false statement and declaration in writing as follows:

#### AFFIDAVIT.

The State of Texas, County of Travis.

I, Henry Clay Pierce, do solemnly swear that I am the president (presirent, secretary, treasurer or director) of the corporation known and styled Waters-Pierce Oil Company, duly incorporated under the laws of Missouri, on the 29th day of May, 1900, and now transacting or conducting business in the State of Texas, and that I am duly authorized to represent said corporation, in making this affidavit, and I do further solemnly swear that the said Waters-Pierce Oil Company, known and styled as aforesaid, has not since the 31st day of January, 1900, created, entered into or become a member of, or a party to, and was not, on the 31st day of January, 1900, nor at any day since that date, and is not now, a member of, or a party to any pool, trust, agreement, combination, confederation or understanding, with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not entered into or become a member of, or a party to, any pool, trust, agreement, contract, combination or confederation, to fix or limit the amount of supply or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, or any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against 136. 2

loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not issued, and does not own any trust certificates for any corporation, agent, officer or employee, or for the directors or stockholders of any corporation, has not entered into, and is not now in any combination, contract, or agreement with any person or persons, corporation or corporations, or with any stockholders or directors thereof, the purpose and effect of which said combination, contract, or agreement would be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee, or trustees, with the intent to limit or fix the price, or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article; that it has not entered into any conspiracy, defined monopoly, in restraint of trade; that it has not been, since January 31, A. D. 1900, and is not now, a monopoly by reason of any conduct on its part, which would constitute it a monopoly under the provisions of sections 2, 3, 4, 5, 6, 10 and 11 of this act, and is not the owner or lessee of a patent to any machinery intended, used or designed for manufacturing any raw material or preparing the same for market by any wrapping, bailing or other process, and while leasing, renting or operating the same, refuses or fails to put the same on the market for sale; that it has not issued, and does not own any trust certificates, and has not, for any corporation or any agent, officer or employee thereof, or for the directors or stockholders thereof, entered into, and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with the stockholders, director or any officer, agent or employee of any corporation or corporations, the purpose and effect of which combination. contract or agreement, would be a conspiracy to defraud, as defined in section 1 of this act, or to create a monopoly, as defined in sections 2, 3, 4, 5, 6, 10 and 11 of this act.

#### HENRY CLAY PIERCE.

(President, Secretary, Treasurer or Director).

Subscribed and sworn to before me, a notary public within and for the county of Travis, this 31st day of May, 1900.

(Signed) N. H. NAGLE,

Notary Public.

Whereas, in truth and in fact, the said Waters-Pierce Oil Company, mentioned in the above false statement and declaration in writing, had since the 31st day of January, 1900, created, entered into, and become a member of, and a party to, and was on the 31st day of January, 1900, and on every day since the 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of, and a party to, a pool, trust, agreement, combination, confederation, and undertaking with other corporations, individuals, and other persons and association of persons, to wit: With the Standard Oil Company of New Jersey, a corporation incorporated under the laws of the State of New Jersey, and with all the Standard Oil Companies of the United

States, the names and descriptions of said companies being to said grand jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers, and other individuals and persons whose names and a description of whom are to said grand jurors unknown after diligent inquiry, to regulate and fix the price of petroleum and all of the products of petroleum being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing; and, whereas, in truth and in fact, the said Waters-Pierce Oil Company, hereinbefore mentioned, had since the 31st day of January, 1900, created, entered into and become a member of, and a party to, and was on the 31st day of January, 1900, and was on every day since the said 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of and a party to a pool, trust, agreement, combination, confederation and undertaking with other corporations, individuals, and other persons and association of persons, to wit: Standard Oil Company of New Jersey, a corporation, incorporated under the laws of the State of New Jersey, and with all the Standard Oil Companies of the United States, the names and descriptions of said companies being to said grand jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers and other individuals and persons whose name and a description of whom are to said grand jury unknown after diligent inquiry, to fix and limit the amount of supply and quantity of petroleum and all of the products of petroleum, being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing; and whereas, in truth and in fact, the said Waters-Pierce Oil Company, hereinbefore mentioned, had since the 31st day of January, 1900, and on every day since said 31st day of January, 1900, up to the 31st day of May, 1900, issued, and did then and on the 31st day of May, 1900, issue trust certificates to another corporation, to wit: the Standard Oil Company of New Jersey, hereinbefore described, its agents, officers and employees, to wit, one J. P. Gruet, and one John D. Johnson, and other agents, officers and employees of said Standard Oil Company of New Jersey, whose names and descriptions are to said grand jurors unknown after diligent inquiry, whereby the said Standard Oil Company of New Jersey then and there became the owner of the majority of all the shares of stock of the said Waters-Pierce Oil Company and the owner of a controlling interest in said Waters-Pierce Oil Company, which said false statement, so made as aforesaid, by the said Henry Clay Pierce, was not then and there required by law nor made in the course of judicial proceedings. Yet the same was then and there, nevertheless, wilfully and deliberately made and was wilfully and deliberately false, as he the said Henry Clay Pierce, then and there well knew.

Against the peace and dignity of the State.

JEFFERSON JOHNSON, Foreman of the Grand Jury.24

[24. Pierce, Ex parte, 155 Fed. 663, holding that the substance of the offense was sufficiently stated in this indictment to sustain extradition proceedings.]

# FORM 119.

CENTRAL CRIMINAL COURT, TO WIT:

The jurors for our Lady the Queen, upon their oath present, that heretofore and after the first day of November, in the year of our Lord 1851, to wit, at the sittings of Nisi prins, holden in Michaelmas Term on the 24th day of November, in the fifteenth year of the reign of our Sovereign Lady Victoria. and in the year of our Lord 1851, at Westminster Hall, in and for the county of Middlesex, before Sir Thomas Joshua Platt, Knight, one of the Barons of her Majesty's Exchequer at Westminster aforesaid, in the absence and in the place and stead of the right Honorable Sir Frederick Pollock, Knight, then being Chief Baron of Her Majesty's Exchequer aforesaid, and within the jurisdiction of the Central Criminal Court, certain issues theretofore duly joined in a certain action on the case then depending in the said Court of Exchequer, wherein one T. B. was the plaintiff, and one G. H. was the defendant, came on to be tried in due form of law, and the same were then and there, that is to say, on the said 24th day of November, in the year aforesaid, and by adjournment on the 25th day of November, in the year aforesaid, duly tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid, and that upon the said trial the said T. B., late of the parish of St. Pancras, in the county of Middlesex, laborer, then and there, within the jurisdiction of the said Central Criminal Court, appeared as a witness, and to give evidence for and on behalf of himself, the said T. B., as such plaintiff in the action aforesaid (the said action not being an action, suit, proceeding or bill in any Court of Common Law, nor any other proceeding whatsoever instituted in consequence of adultery, nor an action for breach of promise of marriage), and that the said T. B. was then and there. and within the jurisdiction of the said Central Criminal Court, duly sworn and took his corporal oath upon the Holy Gospel of God, before the said Sir Thomas Joshua Platt, Knight, so being such baron as aforesaid, that the evidence which he, the said T. B., should give to the said court there and to the said jury so sworn as aforesaid, touching the matters then in question between the said parties, should be the truth, the whole truth, and nothing but the truth (he, the said Sir Thomas Joshua Platt, Knight, so being such baron as aforesaid, then and there having sufficient and competent power and authority to administer the said oath to the said T. B. in that behalf). And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said T. B., for a long space of time, to wit, from the 25th day of March, in the year of our Lord 1844, and from thence until and upon the 21st day of June, in the year of our Lord 1851, was and still is tenant to the said G. H. of a certain dwelling house and premises with the appurtenances, situate and being in the county aforesaid, at and under a certain rent theretofor payable by the said T. B. to the said G. H., and that before the commencement

of the said action, to wit, on the said 21st day of June, in the year of our Lord 1851, aforesaid, a certain distress had been made and levied by the said G. H. upon certain goods and chattels of the said T. B. for and in respect of certain arrears of the said rent at the time of making and levying the said distress claimed to be due and owing from the said T. B. to the said G. H. And the jurors first aforesaid, upon their oath aforesaid, present, that the said T. B., before the commencement of the said action, to wit, in the year of our Lord 1848, was indebted to one W. H. D. in a certain sum of money for certain costs due and payable by the said T. B. to the said W. H. D. the jurors first aforesaid, upon their oath aforesaid, do further present, that upon the trial of the said issues so joined between the said parties as aforesaid, the following question arose, and then and there became and were material questions, and each and every of them then and there became and was a material question upon the trial of the said issues (that is to say), for and in respect of how long a space of time rent was due and in arrear from the said T. B. to the said G. H. at the time of making and levying the said distress, and whether, at the time of making and levying the said distress, rent was due and in arrear from the said T. B. to the said G. H. for and in respect of a longer space of time than one-quarter of a year; and whether at the time of making and levying the said distress, rent was due and in arrear from the said T. B. to the said G. H. for and in respect of the space of one whole year and one-quarter of another year; and also whether, from the month of August, in the year of our Lord 1848, to the month of February, in the year of our Lord 1851, the said T. B. had paid each quarter of a year's rent of the rent aforesaid, in one sum or by instalments; and whether the last five quarters' rent of the rent aforesaid, paid by the said T. B. next before the 5th day of February, in the year of our Lord 1851, were paid by instalments; and also whether, in the month of August, in the year of our Lord 1850, one J. H., the son of the said G. H., called on the said T. B., and then and on that occasion asked the said T. B. if he, the said T. B., could pay a part of the then running quarter of a year's rent in advance, and which would become due to the said G. H. at Michaelmas, in the year last aforesaid; and whether the said T. B. did then and on such occasion pay to the said J. H. the sum of £10, or any other sum of money, in advance, on account of rent which was not due at that time. And also whether or not the said T. B. did, in the year of our Lord 1848, agree to pay the said costs so due to the said W. H. D. as aforesaid, by instalments. And whether the said T. B. did pay the amount of such costs to the said W. H. D. by instalments or all at once. And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said T. B., being so sworn as aforesaid, not having the fear of God before his eyes, nor regarding the laws of his realm, and contriving and intending to pervert the due course of law and justice, and unjustly to aggrieve the said G. H., the defendant in said action, and to cause a verdict to pass against the said G. H., on the trial of the said issues, and thereby to subject him, the said G. H., to the payment of sundry heavy damages, costs, charges and ex-

penses, then and there and within the jurisdiction of the said Central Criminal Court (to wit), on the said 24th day of November, in the year first aforesaid, at Westminster aforesaid, in the county aforesaid, on the trial of the said issues, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said jurors so sworn there as aforesaid, and before the said Sir Thomas Joshua Platt, Knight, so being such baron as aforesaid, did depose and swear (amongst other things) in substance, and to the effect following, that is to say, there was only the rent for one quarter (meaning only one-quarter of a year's rent of the rent aforesaid), due at the time of the distress (meaning the said distress and the said time of making and levying the same, and thereby then meaning that at the time of making and levying the said distress, rent was due and in arrear from him, the said T. B., to the said G. H., for and in respect of the space of one-quarter of a year only, and no longer). And that from the month of August, 1848 (meaning the month of August, in the year of our Lord 1848), he (meaning the said T. B.) paid every quarter's rent (meaning each quarter of a year's rent of the rent aforesaid), at one payment (thereby then meaning that from the time last aforesaid each quarter of a year's rent of the rent aforesaid, paid by the said T. B., had been paid in one sum, and not by instalments). And that the last five quarters' rent (meaning the rent for one year, and the quarter of another year, paid by the said T. B., next before the said 5th day of February, in the year of our Lord 1851), were not paid by instalments, and that the rent (meaning the rent for the period last aforesaid) was paid in quarterly payments (not by instalments). And that in August, 1850 (meaning the month of August, in the year of our Lord 1850 aforesaid), the son (meaning the said J. H., the son of the said G. H.), called and said his father (meaning the said G. H., the father of the said J. H.), had a large sum to make up, and he (meaning the said J. H.) asked him (meaning the said T. B.) if he (meaning the said T. B.) could pay a part of that quarter's rent in advance (thereby then meaning that in the said month of August, in the year of our Lord 1850, the said J. H. called and asked the said T. B. to pay a part of the then running and current quarter of a year's rent in advance, and which would not become due to the said G. H. from the said T. B. until Michaelmas, in the year last aforesaid). And that he, the said T. B., then (meaning in the month and year, and on the supposed occasion last aforesaid) paid to the said J. H. £10 for the rent that was not due at that time (thereby then meaning that the said T. B., on the occasion last aforesaid, paid to the said J. H. the sum of £10 in advance on account of the then running and current quarter of a year's rent of the rent aforesaid, and which was not due at that time). And that he (meaning the said T. B.) did not in the year 1848 (meaning the year of our Lord 1848) agree to pay D's costs (meaning the said costs so due to the said W. H. D. as aforesaid) by instalments. And that he (meaning the said T. B.) paid the amount (meaning the amount of the costs aforesaid) all at once. Whereas, in truth and in fact, upon the occasion and at the time of making and levying the said distress,

that is to say, on the said 21st day of June, in the year of our Lord 1851 aforesaid, rent was due and in arrear from the said T. B. to the said G. H., for and in respect of a longer space of time than one-quarter of a year. And whereas, in truth and in fact, upon the occasion and at the time of levying and making the said distress, to wit, on the said 21st day of June, in the year last aforesaid, rent was due and in arrear from the said T. B. to the said G. H., for and in respect of the space of one whole year, and one-quarter of another year. And whereas, in truth and in fact, each quarter of a year's rent of the rent aforesaid, paid by the said T. B., from the month of August, in the year of our Lord 1848, had not been paid in one sum, but, on the contrary thereof, each and every such quarter of a year's rent paid by the said T. B. during the time last aforesaid, except three of such quarters, had been and was paid by instalments, and not in one sum. And whereas, in truth and in fact, the last five quarters' rent, that is to say, the rent for one year and the quarter of another year, paid by the said T. B. next before the said 5th day of February, in the year of our Lord 1851, were paid by instalments, and the rent aforesaid, for the period last aforesaid, was paid by instalments, and not in quarterly payments. And whereas, in truth and in fact, the said J. H. did not, in the said month of August, in the year of our Lord 1850, nor in any other month in the said last-mentioned year, nor at any other time nor on any occasion whatsoever, say to the said T. B. that his, the said J. H.'s father (meaning the said G. H.) had a large sum of money to make up, nor did he, the said J. H., then or at any other time or on any occasion whatsoever, ask the said T. B. if he, the said T. B., could pay a part of that quarter's rent in advance, nor did he, the said J. H., then or on any other occasion whatsoever ask the said T. B. to pay a part of a quarter's rent or any rent whatsoever in advance or before the same had become due and payable from the said T. B. to the said G. H. And whereas, in truth and in fact, the said T. B. did not in the said month of August, in the year of our Lord 1850, and on the occasion of the said supposed application, pay to the said J. H. £10 nor any other sum of money whatsoever for the rent that was not due at that time, nor did he, the said T. B., then pay to the said J. H. any sum of money whatsoever, nor did the said T. B. then or in any other month in the year last aforesaid, nor on any other occasion, nor at any other time whatsoever, pay to the said J. H. the sum of £10 nor any sum of money whatsoever in advance or for rent that was not due at the time or on any other account whatsoever. And whereas, in truth and in fact, before the commencement of the said action, that is to say, upon the 12th day of May, in the year of our Lord 1848, the said T. B. did agree to pay the said costs so due to the said W. H. D. as aforesaid by instalments, that is to say, by instalments of £5 a month. And whereas, in truth and in fact, the said T. B., before the commencement of the said action, did pay the amount of such costs to the said W. H. D. by instalments of £5 a month, and not all at once. And so the jurors first aforesaid, upon their oath aforesaid, do say that the said T. B., on the said 24th day of November, in the year of our Lord 1851 aforesaid, at West-

minster aforesaid, and within the jurisdiction of the said Central Criminal Court, before the said Sir Thomas Joshua Platt, Knight (he, the said Sir Thomas Joshua Platt, Knight, then and there having such power and authority as aforesaid), by his own act and consent, and of his most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did, upon the said trial of the said issues, commit wilful and corrupt perjury, in contempt of our Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

#### Second Count.

And the jurors first aforesaid, upon their oath aforesaid, do further present, that heretofore and after the 1st day of November, in the year of our Lord 1851, to wit, at the sittings of Nisi Prius, holden in Michaelmas Term, on the 24th day of November, in the fitfeenth year of the reign of our Sovereign Lady Victoria, and in the year of our Lord 1851 aforesaid, at Westminster Hall, in and for the county of Middlesex aforesaid, before Sir Thomas Joshua Platt, Knight, one of the barons of her Majesty's Exchequer at Westminster aforesaid, in the absence and in the place and stead of the Right Honorable Sir Frederick Pollock, Knight, then being Chief Baron of Her Majesty's Exchequer aforesaid, and within the jurisdiction of the Central Criminal Court aforesaid, certain issues theretofore duly joined in a certain action on the case then depending in the said Court of Exchequer, wherein the said T. B. was the plaintiff and the said G. H. was the defendant, came on to be tried in due form of law, and the same were then and there, that is to say, on the said 24th day of November, in the year last aforesaid, and by adjournment on the 25th day of November, in the year last aforesaid, duly tried by a jury of the country in that behalf duly sworn, and taken between the parties aforesaid, and that upon the said trial the said T. B. then and there, and within the jurisdiction of the said Central Criminal Court, appeared as a witness, and to give evidence for and on behalf of himself, the said T. B., as such plaintiff in the said action, the said action not being an action suit, proceeding, or bill in any court of common law, nor any other proceeding whatsoever instituted in consequence of adultery, nor an action for breach of promise of marriage, and that the said T. B. was then and there, and within the jurisdiction of the said Central Criminal Court, duly sworn, and took his corporal oath upon the Holy Gospel of God, before the said Sir Thomas Joshua Platt, Knight, so being such baron as aforesaid, that the evidence which he, the said T. B., should give to the said court there and to the said jury so sworn as aforesaid, touching the matters then in question between the said parties, should be the truth, the whole truth, and nothing but the truth (he, the said Sir Thomas Joshua Platt, Knight, so being such baron as aforesaid, then and there having sufficient and competent power and authority to administer the said oath to the said T. B. in that behalf). And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said T. B. for a long space of time, to wit, from the 25th day of March, in

the year of our Lord 1844, and from thence until and upon the 21st day of June, in the year of our Lord 1851, was and still is tenant to the said G. H. of a certain dwelling-house and premises, with the appurtenances, situate and being in the county aforesaid, at and under a certain rent therefor payable by the said T. B. to the said G. H., and that before the commencement of the said action, to wit, on the 21st day of June, in the year of our Lord 1851 aforesaid, a certain distress had been made and levied by the said G. H. upon certain goods and chattels of the said T. B. for and in respect of certain arrears of the said rent at the time of making and levying the said distress, claimed to be due and owing from the said T. B. to the said G. H. And the jurors first aforesaid, upon their oath aforesaid, do further present, that upon the trial of the said issues so joined between the said parties as aforesaid, the following questions arose, and then and there became and were material questions, and each and every one of them then and there became and was a material question upon the trial of the said issues, that is to say, for and in respect of how long a space of time rent was due and in arrear from the said T. B. to the said G. H. at the time of making and levying the said distress. And whether at the time of making and levying the said distress, rent was due and in arrear from the said T. B. to the said G. H., for and in respect of a longer space of time than one-quarter of a year. And whether at the time of making and levying the said distress, rent was due and in arrear from the said T. B. to the said G. H. for and in respect of one whole year and one quarter of another year. And also whether, in the month of August, in the year of our Lord 1850, one J. H., the son of the said G. H., applied to the said T. B. to advance £10 on account of the then running rent, which would not become due to the said G. H. from the said T. B. until Michaelmas, in the year of our Lord 1850. And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said T. B., being so sworn as aforesaid, not having the fear of God before his eyes, nor regarding the laws of this realm, and contriving and intending to pervert the due course of law and justice, and unjustly to aggrieve the said G. H., the defendant in the said action, and to cause a verdict to pass against him, the said G. H., on trial of the said issues, and thereby to subject him, the said G. H., to the payment of sundry heavy damages, costs, charges, and expenses, then and there, and within the jurisdiction of the said Central Criminal Court, to wit, on the said 25th day of November, in the year first aforesaid, to wit, at Westminster aforesaid, in the county aforesaid, on the trial of the said issues, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully and maliciously, before the said jurors so sworn there as aforesaid, and before the said Sir Thomas Joshua Platt, Knight, so being such baron as aforesaid. did depose and swear (amongst other things), in substance, and to the effect following, that is to say, there was only one quarter due up to the time of the distress (thereby then meaning that rent for the space of onequarter of a year only, and no longer, was due and in arrear from him, the said T. B., to the said G. H. at the time of the making and levying of the

said distress). And that H.'s son (meaning the said J. H., the son of the said G. H.) applied to him to advance £10 on account of the running rent which would become due at Michaelmas, 1850. It was August 10th (meaning the 10th day of August, in the year last aforesaid), he (meaning the said J. H.) called (thereby then meaning that the said J. H., on the day and year last aforesaid, called on the said T. B.), and then applied to him, the said T. B., to advance £10 to the said G. H. on account of the then running quarter of a year's rent, and which would not become due or payable from the said T. B. to the said G. H. until Michaelmas, that is to say, the 29th day of September, in the year of our Lord 1850, whereas, in truth and in fact, at the time of the making and levying of the said distress, that is to say, on the said 21st day of June, in the year of our Lord 1851 aforesaid, rent was due and in arrear from the said T. B. to the said G. H. for and in respect of a longer space of time than one-quarter of a year; and whereas, in truth and in fact, at the time of the making and levying of the said distress, to wit, on the day and year last aforesaid, rent was due and in arrear from the said T. B. to the said G. H. for the space of one whole year, and one-quarter of another year; and whereas, in truth and in fact, the said J. H. did not on the said 10th day of August, in the year of our Lord 1850, nor on any other day, nor at any time, nor on any occasion whatsoever, apply to the said T. B. to advance £10, or any other sum of money whatsoever, to the said G. H. on account of the then running quarter of a year's rent; and whereas, in truth and in fact, he, the said J. H., did not on the day and year last aforesaid, nor on any other day, nor at any time, nor on any occasion whatsoever, request the said T. B. to pay any sum of money on account of any rent in advance, or before the same had become due and payable from him, the said T. B., to the said G. H., nor to pay any sum of money in advance on any account whatsoever. And so the jurors first aforesaid, upon their oath aforesaid, do say that the said T. B., on the said 25th day of November, in the year of our Lord 1851 aforesaid, at Westminster aforesaid, and within the jurisdiction of the said Central Criminal Court, before the said Sir Thomas Joshua Platt. Knight (he, the said Sir Thomas Joshua Platt, Knight, then and there having such power and authority as aforesaid), by his own act and consent, and of his own most wicked and corrupt mind, and in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did, upon the said trial of the said issues, commit wilful and corrupt perjury, in contempt of our Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.25

[25. 5 Cox Cr. Cas. LXI, Appendix.]

#### FORM 120.

#### Perjury-Subornation of.

COURT OF GENERAL CESSIONS OF THE PEACE, In and for the County of New York.

The People of the State of New York against Abraham H. Hummel and Benjamin Steinhardt.

The grand jury of the county of New York, by this indictment, accuse Abraham H. Hummel and Benjamin Steinhardt of the crime of subornation of perjury, committed as follows:

Heretofore, to wit, on the twenty-seventh day of June, in the year of our Lord one thousand eight hundred ninety-eight, there was duly entered and filed in the office of the clerk of the county of New York a certain final judgment and decree in an action theretofore brought in the Supreme Court of the State of New York, in the county of New York, by one Clemence Dodge against one Charles F. Dodge, her husband, to dissolve the bonds of matrimony between the said Clemence Dodge and the said Charles F. Dodge, in which said action one Mortimer A. Ruger appeared as the attorney for the said Charles F. Dodge, by which judgment and decree it was, among other things, adjudged and decreed that the marriage between the said Clemence Dodge and the said Charles F. Dodge should be, and the same thereby was, dissolved, and the said parties and each of them freed from the obligations thereof.

And thereupon, and at all times thereafter herein mentioned, it became and was material for the proper hearing and disposition by the said Supreme Court of the order to show cause hereinbelow described, whether the said Charles F. Dodge ever retained the said Mortimer A. Ruger as his attorney in the aforesaid action or authorized him to appear therein, and whether the said Charles F. Dodge ever was served with the summons in the said action, and whether he was served with the summons in the said action by one William A. Sweetser, and whether he was served with the summons by the said William A. Sweetser on the 31st day of March, in the year one thousand eight hundred ninety-seven, and whether he had ever seen or met the said William A. Sweetser.

And afterwards, to wit, on the 19th day of October, in the year of our Lord one thousand nine hundred and three, the said Charles F. Dodge, late of the Borough of Manhattan, of the city of New York, in the county of New York aforesaid, at the borough and county aforesaid, did personally go and appear before one John J. Canavan, then and there being a commissioner of deeds of the city of New York, duly appointed, qualified and acting as such, and did then and there produce and exhibit to the said John J. Canavan, Esquire, such commissioner of deeds as aforesaid, a certain affidavit in writing of him, the said Charles F. Dodge, entitled in the said court and action and prepared for use in the said action upon the motion brought on by the order to

show cause hereinbelow described, and then and there intended by him, the said Charles F. Dodge, for such use and to influence the said court in its disposition of the said motion, and containing divers allegations and statements of and concerning the matters in question upon the said motion, the same being then and there duly signed and subscribed by him, the said Charles F. Dodge, in his own proper handwriting, with his certain signature as follows, to wit, C. F. Dodge.

And the said Charles F. Dodge was then and there in due form of law duly sworn and did take his corporal oath by and before the said John J. Canavan, such commissioner of deeds as aforesaid, touching and concerning the truth of the matters so contained in the said affidavit and writing, that the said affidavit in writing so subscribed by him as aforesaid was true, he, the said John J. Canavan, such commissioner of deeds as aforesaid, having then and there full and competent power and authority to administer such oath to the said Charles F. Dodge in that behalf.

And the said Charles F. Dodge, being so sworn as aforesaid, then and there, to wit, on the said 19th day of October, 1903, at the borough and county aforesaid, before the said John J. Canavan, Esquire, such commissioner of deeds as aforesaid, upon his oath aforesaid, in and by his said affidavit in writing, and of and concerning the material matters aforesaid, feloniously, wilfully, knowingly and corruptly did falsely swear, depose and say, among other things, in substance and to the effect following, that is to say:

That he, the said Charles F. Dodge, never, directly or indirectly, retained the said Mortimer A. Ruger or authorized him to appear as his lawyer in the aforesaid action; and that he was at no time or place served with the summons in that said action; that a certain affidavit theretofore made by the said William A. Sweetser, to the effect that the said Charles F. Dodge was on the 31st day of March, 1897, served with a summons in the said action by the said William A. Sweetser, was absolutely false; that he, the said Charles F. Dodge, was not at that or at any other time served with a summons in the said action; and that he, the said Charles F. Dodge, had never seen or met the said William A. Sweetser. Whereas, in truth and in fact, the said Charles F. Dodge had directly retained the said Mortimer A. Ruger and authorized him to appear as his lawyer in the said action, and was served with the summons in the said action on the 31st day of March, 1897, at the Everett House, in the city and county of New York, by the said William A. Sweetser, and the said affidavit theretofore made by the said William A. Sweetser, to the effect that he had on the 31st day of March, 1897, served the said Charles F. Dodge with a summons in the said action, was not absolutely false, but was wholly true, and the said Charles F. Dodge had met and seen the said William A. Sweetser, to wit, on the said 31st day of March, one thousand eight hundred ninety-seven, at the said Everett House, in the said city and county of New York, all of which he, the said Charles F. Dodge, then and there, to wit, at the time he so as aforesaid falsely swore, deposed and said, well knew. And afterwards, to wit, on the said 19th day of Octo-

ber, 1903, at the borough and county aforesaid, the said Charles F. Dodge delivered the said affidavit in writing so sworn to as aforesaid by him, the said Charles F. Dodge, to some person or persons to the grand jury aforesaid unknown, with intent that it should be produced and used on behalf of him, the said Charles F. Dodge, such defendant in the said action as aforesaid, upon the motion hereinbelow described.

And afterwards, to wit, on the 20th day of October, 1903, upon the judgment-roll in the said action and the testimony taken before the referee therein and on all the pleadings and proceedings therein and upon the said affidavit of the said Charles F. Dodge, produced before the Honorable Edward E. Mc-Call, a Justice of the Supreme Court of the State of New York, an order was duly made by the said Honorable Edward E. McCall, such Justice as aforesaid, requiring the said Clemence Dodge, the plaintiff in the said action as aforesaid, to show cause before one of the justices of the said court, at a Special Term, at a Part I thereof, to be held at the court house in the City Hall of the city of New York, in the Borough of Manhattan, on the 2d day of November, 1903, at half-past ten o'clock in the forenoon of the said day, or as soon thereafter as counsel could be heard, why the said judgment and decree of divorce entered in the said action should not be vacated and set aside upon the grounds stated in the said affidavit of the said Charles F. Dodge, and why the defendant in the said action should not have such other and further relief as to the court should seem just and proper, and by which said order it was also provided that service of the said order on or before the 31st day of October, 1903, should be deemed due and timely.

And afterwards, to wit, on the 29th day of October, 1903, the said affidavit and order were duly served upon Clemence Dodge, the plaintiff in the said action, and the said affidavit of the said Charles F. Dodge was thereafter by the act and procurement of him, the said Charles F. Dodge, produced and used on behalf of him, the said Charles F. Dodge, such defendant as aforesaid, upon the said motion, and filed in the office of the clerk of the county of New York.

And the said Abraham H. Hummel and Benjamin Steinhardt, both late of the Borough of Manhattan of the city of New York, in the county of New York aforesaid, were then and there feloniously concerned in the commission of the said perjury by the said Charles F. Dodge, in the manner and form aforesaid, and did then and there feloniously aid and abet him in the commission of the same in manner and form aforesaid, and did then and there corruptly, wickedly, maliciously and feloniously command, induce, procure, solicit, suborn, instigate and persuade the said Charles F. Dodge, the said wilful and corrupt perjury, in the manner and form aforesaid, then and there feloniously to do and commit.

And the said Abraham H. Hummel and Benjamin Steinhardt then and there well knew and intended that the said Charles F. Dodge would and should so as aforesaid feloniously, knowingly, wilfully, corruptly and falsely swear, depose and say and well knew that the said matters so as aforesaid by the

said Charles F. Dodge sworn to be true were false, and were then and there known by the said Charles F. Dodge to be false, and that the said Charles F. Dodge, when he so as aforesaid swore, deposed and said, did wilfully, feloniously, knowingly, corruptly and falsely commit wilful and corrupt perjury; against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

#### Second Count.

And the grand jury aforesaid, by this indictment, further accuse the said Abraham H. Hummel and Benjamin Steinhardt of the same crime of subornation of perjury, committed as follows:

Heretofore, to wit, on the twenty-seventh day of June, in the year of our Lord one thousand eight hundred ninety-eight, there was duly entered and filed in the office of the clerk of the county of New York, a certain final judgment and decree in an action theretofore brought in the Supreme Court of the State of New York, in the county of New York, by one Clemence Dodge against one Charles F. Dodge, her husband, to dissolve the bonds of matrimony between the said Clemence Dodge and the said Charles F. Dodge, in which said action one Mortimer A. Ruger appeared as the attorney for the said Charles F. Dodge, by which judgment and decree it was among other things adjudged and decreed that the marriage between the said Clemence Dodge and the said Charles F. Dodge should be, and the same thereby was, dissolved, and the said parties and each of them freed from the obligations thereof.

And thereupon, and at all the times thereafter herein mentioned, it became and was material for the proper hearing and disposition by the said Supreme Court of the order to show cause hereinbelow described, whether the said Charles F. Dodge ever retained the said Mortimer A. Ruger or authorized him to appear as his attorney in the aforesaid action and whether the said Charles F. Dodge ever was served with the summons in the said action and whether he was served with the summons in the said action by one William A. Sweetser, and whether he was served with the summons by the said William A. Sweetser on the 31st day of March, in the year one thousand eight hundred ninety-seven and whether he had ever seen or met the said William A. Sweetser.

And afterwards, to wit, on the 19th day of October, one thousand nine hundred three, at the Borough of Manhattan of the city of New York, in the county of New York aforesaid, the said Abraham H. Hummel and Benjamin Steinhardt, both late of the borough and county aforesaid, did unlawfully, corruptly, wickedly and feloniously solicit, suborn, instigate, persuade, procure and induce the said Charles F. Dodge to personally go and appear before one John J. Canavan, then and there being a commissioner of deeds of the city of New York, duly appointed, qualified and acting as such, and then and there to produce and exhibit to the said John J. Canavan, Esquire, such commissioner of deeds, as aforesaid, a certain affidavit in writing of him, the said Charles F. Dodge, entitled in the said court and action and prepared for use

in the said action upon the motion brought on by the order to show cause hereinbelow described and then and there intended by him, the said Charles F. Dodge, and by them, the said Abraham H. Hummel and Benjamin Steinhardt, for such use and to influence the said court in its disposition of the said motion, and containing divers allegations and statements of and concerning the matters in question upon the said motion, the same being then and there duly signed and subscribed by him, the said Charles F. Dodge, in his own proper handwriting, with his certain signature as follows, to wit, C. F. Dodge, and in due form of law to swear and take his corporal oath by and before the said John J. Canavan, such commissioner of deeds as aforesaid, touching and concerning the truth of the matters so contained in the said affidavit and writing, that the said affidavit in writing so subscribed by him as aforesaid was true.

And afterwards, to wit, on the 19th day of October, in the year of our Lord one thousand nine hundred three, the said Charles F. Dodge, late of the Borough of Manhattan, of the city of New York, in the county of New York aforesaid, at the borough and county aforesaid, in consequence of, and by the means, encouragement and effect of the said wicked, wilful and corrupt subornation and procurement of the said Abraham H. Hummel and Benjamin Steinhardt, did personally go and appear before the said John J. Canavan, then and there being such commissioner of deeds of the city of New York as aforesaid, duly appointed, qualified and acting as such, and did then and there produce and exhibit to the said John J. Canavan, Esquire, such commissioner of deeds as aforesaid, the said affidavit in writing of him, the said Charles F. Dodge, entitled in the said court and action and prepared for use in the said action upon the motion brought on by the order to show cause hereinbelow described, and then and there intended by him, the said Charles F. Dodge, and by them, the said Abraham H. Hummel and Benjamin Steinhardt, for such use and to influence the said court in its disposition of the said motion, and containing divers allegations and statements of and concerning the matters in question upon the said motion, the same being then and there duly signed and subscribed by him, the said Charles F. Dodge, in his own proper handwriting with his certain signature as follows, to wit, C. F. Dodge.

And the said Charles F. Dodge was then and there in due form of law duly sworn and did'take his corporal oath by and before the said John J. Canavan, such commissioner of deeds as aforesaid, touching and concerning the truth of the matters so contained in the said affidavit and writing that the said affidavit in writing so subscribed by him as aforesaid was true, he, the said John J. Canavan, such commissioner of deeds as aforesaid, having then and there full and competent power and authority to administer such oath to the said Charles F. Dodge in that behalf.

And the said Charles F. Dodge, being so sworn as aforesaid, then and there, to wit, on the said 19th day of October, 1903, at the borough and county

aforesaid, before the said John J. Canavan, Esquire, such commissioner of deeds as aforesaid, upon his oath aforesaid, in and by his said affidavit in writing, and of and concerning the material matters aforesaid, in consequence of and by the means, encouragement and effect of the said wicked, wilful and corrupt subornation and procurement of the said Abraham H. Hummel and Benjamin Steinhardt, feloniously, wilfully, knowingly and corruptly did falsely swear, depose and say, among other things, in substance and to the effect following, that is to say:

That he, the said Charles F. Dodge, never, directly or indirectly, retained the said Mortimer A. Ruger, or authorized him to appear as his lawyer in the aforesaid action; that he was at no time or place served with the summons in the said action; that a certain affidavit theretofore made by the said William A. Sweetser, to the effect that the said Charles F. Dodge was on the 31st day of March, 1897, served with a summons in the said action by the said William A. Sweetser, was absolutely false; that he, the said Charles F. Dodge, was not at that or any other time served with a summons in the said action; and that he, the said Charles F. Dodge, had never seen or met the said William A. Sweetser.

Whereas, in truth and in fact, the said Charles F. Dodge had directly retained the said Mortimer A. Ruger as his lawyer and authorized him to appear in the said action, and was served with the summons in the said action on the 31st day of March, 1897, at the Everett House, in the city and county of New York, by the said William A. Sweetser, and the said affidavit theretofore made by the said William A. Sweetser, to the effect that he had on the 31st day of March, 1897, served the said Charles F. Dodge with a summons in the said action, was not absolutely false, but was wholly true, and the said Charles F. Dodge had met and seen the said William A. Sweetser, to wit, on the said 31st day of March, one thousand eight hundred and ninety-seven, at the said Everett House in the said city and county of New York, all of which he, the said Charles F. Dodge, then and there, to wit, at the time he so as aforesaid falsely swore, deposed and said, well knew.

And whereas, in truth and in fact, at the time the said Abraham H. Hummel and Benjamin Steinhardt so as aforesaid solicited, suborned, instigated, induced and procured the said Charles F. Dodge to so personally go and appear before the said John J. Canavan, such commissioner of deeds as aforesaid, and there to produce and exhibit to him the affidavit aforesaid and to swear as aforesaid that the said affidavit was true, they, the said Abraham H. Hummel and Benjamin Steinhardt, and the said Charles F. Dodge, well knew that the said affidavit was not true, and that the said Charles F. Dodge had directly retained the said Mortimer A. Ruger as his lawyer and authorized him to appear in the said action, and that he, the said Charles F. Dodge, was served with the summons in the said action on the 31st day of March, 1897, at the Everett House, in the city and county of New York, by the said William A. Sweetser, and that the said affidavit theretofore made by the said William A. Sweetser, to the effect that he had on the 31st day of March,

1897, served the said Charles F. Dodge with a summons in the said action, was not absolutely false, but was wholly true, and the said Charles F. Dodge had met and seen the said William A. Sweetser, to wit, on the said 31st day of March, one thousand eight hundred ninety-seven, at the said Everett House, in the said city and county of New York. And afterwards, to wit, on the said 19th day of October, 1903, at the borough and county aforesaid, the said Charles F. Dodge, in consequence of and by the means, encouragement and effect of the said wicked, wilful and corrupt subornation and procurement of the said Abraham H. Hummel and Benjamin Steinhardt, delivered the said affidavit in writing so sworn to as aforesaid by him, the said Charles F. Dodge, to some person or persons to the grand jury aforesaid unknown, with the intent on his part and on the part of the said Abraham H. Hummel and Benjamin Steinhardt that it should be produced and used on behalf of him, the said Charles F. Dodge, such defendant in the said action as aforesaid, upon the motion hereinbelow described. And afterwards, to wit, on the 20th day of October, 1903, upon the judgment-roll in the said action and the testimony taken before the referee therein and on all the pleadings and proceedings therein and upon the said affidavit of the said Charles F. Dodge, produced before the Honorable Edward E. McCall, a Justice of the Supreme Court of the State of New York, an order was duly made by the said Honorable Edward E. McCall, such justice as aforesaid, requiring the said Clemence Dodge, the plaintiff in the said action as aforesaid, to show cause before one of the justices of the said court, at a Special Term, at a Part I thereof, to be held at the court house in the City Hall of the city of New York, in the Borough of Manhattan, on the 2d day of November, 1903, at half-past ten o'clock in the forenoon of the said day, or as soon thereafter as counsel could be heard, why the said judgment and decree of divorce entered in the said action should not be vacated and set aside upon the grounds stated in the said affidavit of the said Charles F. Dodge, and why the defendant in the said action should not have such other and further relief as to the court should seem just and proper, and by which said order it was also provided that service of the said order on or before the 31st day of October, 1903, should be deemed due and timely. And afterwards, to wit, on the 29th day of October, 1903, the said affidavit and order were duly served upon Clemence Dodge, the plaintiff in the said action, and the said affidavit of the said Charles F. Dodge was thereafter by the act and procurement of him, the said Charles F. Dodge, and in consequence of and by the means, encouragement and effect of the said wicked, wilful and corrupt subornation and procurement of the said Abraham H. Hummel and Benjamin Steinhardt, produced and used on behalf of him, the said Charles F. Dodge, such defendant as aforesaid, upon the said motion, and filed in the office of the clerk of the county of New York. And so the grand jury aforesaid do say that the said Abraham H. Hummel and Benjamin Steinhardt, in the manner and form aforesaid, feloniously, corruptly, knowingly, wilfully, maliciously and falsely did solicit, suborn, instigate, persuade, procure and induce him, the said Charles F.

Dodge, to commit wilful and corrupt perjury; against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

WM. TRAVERS JEROME,

District Attorney.26

[26. In People ex rel. Hummel v. Trial Term, 184 N. Y. 30, — N. E. —, the case in which this indictment was found is reported, the decision being in respect to the right to a writ of prohibition. In the lower court the defendant moved the court for an order quashing the indictment upon the ground that he had been compelled to testify against himself before the grand jury, which motion was denied.]

#### FORM 121.

#### Petit Larceny as a Second Offense.

STATE OF NEW YORK, COLUMBIA COUNTY, SS .:

The jurors of the people of the State of New York, in and for the body of the county of Columbia, upon their oath and affirmation do present, that at the court of common pleas begun and holden at Lenox, within and for the county of Berkshire, in the Commonwealth of Massachusetts, on the first Monday of January, in the year 1853, George Caesar was indicted for that at Richmond, in the said county of Berkshire, on the seventh day of August then last past, in a certain building then and there called and being a dwelling house of one Mary Van Buren, there situate, then and there in the said building, one pair of pantaloons of the value of five dollars, the proper goods and chattels of one Charles M. Van Buren, and one cloth cap of the value of fifty cents, and one gun of the value of ten dollars, of the goods and chattels of one George Albert Van Buren, all in the said building then and there being found, then and there feloniously did steal, take and carry away, against the peace of the Commonwealth of Massachusetts, and contrary to the form of the statute of the said Commonwealth in such case made and provided, whereupon such proceedings were had in due form of law, at the said January term of the said court, that the said George Caesar was convicted of the offense above set forth whereof he was indicted as aforesaid and the said court thereupon considered, ordered and adjudged that the said George Caesar, convicted of the offense aforesaid, be confined to hard labor in the house of correction, within the county of Berkshire aforesaid, for the term of eighteen months and that he stand committed according to said sentence, and the said George Caesar was so sentenced at the said term of the said court on the tenth day of January, 1853, the said court then and there at the times aforesaid, having full power, jurisdiction, and authority in the premises.

And the jurors aforesaid upon their oath and affirmation aforesaid, do

further present that the said George Caesar, late of the town of Canaan, in the county of Columbia, and State of New York, being the same George Caesar who was convicted and sentenced as aforesaid of petit larceny, after the said conviction and sentence, and after having been discharged from the said conviction and sentence, to wit, on the 27th day of December, 1854, at the town of Canaan, in the county of Columbia, and State of New York, with force and arms, three cotton shirts of the value of fifty cents each, one skirt of the value of one dollar and fifty cents, one table cloth of the value of fifty cents, six pillow covers of the value of twenty-five cents, the goods, chattels and property of Alonzo Lockwood, then and there being found, did then and there feloniously steal, take and carry away against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

WILLIAM A. PORTER.

District Attorney.27

[27. People v. Caesar, 1 Park. Cr. R. (N. Y.) 645.]

#### FORM 122.

#### Piracy.

UNITED STATES OF AMERICA, MASSACHUSETTS DISTRICT, SS.:

At a Circuit Court of the United States, for the First Circuit, begun and held at Boston, within and for the District of Massachusetts, on the 15th day of October, in the year of our Lord eighteen hundred and twelve. The jurors for the United States, within and for the district and circuit aforesaid, upon their oath, present, that Samuel Tully, late of the city of Philadelphia, in the district of Pennsylvania, mariner, and John Dalton, late also of the same city of Philadelphia, mariner, on the 10th day of January, now last past, with force and arms, upon the high seas, near a place called the Isle of May, one of the Cape Verde Islands, and out of the jurisdiction of any particular state, they, the said Samuel Tully and John Dalton, being then and there mariners of a certain vessel of the United States, being a schooner called the George Washington, then and there belonging and appertaining to a certain citizen or citizens of the United States, to the jurors aforesaid as yet unknown, of which said vessel, one Uriah Phillips Levy, a citizen of the United States, was then and there master and commander, piratically and feloniously did then and there run away with the aforesaid vessel called the George Washington, and with certain goods and merchandise, that is to say, fourteen quarter casks of Teneriffe wine, and two thousand Spanish milled dollars, being altogether of the value of five thousand dollars, which were then and there on board of the vessel aforesaid; they, the said Samuel Tully and John Dalton, during all the time aforesaid being then and there mariners of the said vessel, and in and on board of the same on the high seas as aforesaid, against the peace and dignity

of the United States, and the form of the statute in such cases made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Samuel Tully and John Dalton, on the said 10th day of January, now last past, then being mariners of, in, and on board the said schooner or vessel called George Washington, belonging and appertaining to certain citizens of the United States (to the jurors aforesaid as yet unknown), with force and arms upon the high seas aforesaid, and out of the jurisdiction of any particular state, near a place called the Isle of May, one of the Cape Verde Islands, in and on board the said schooner or vessel called the George Washington, whereof the said Uriah Phillips Levy, a citizen of the said United States, then and there was master as aforesaid, the same schooner or vessel, and the tackle and apparel thereof, of the value of five thousand dollars, of lawful money of the United States, and certain goods and merchandise, to wit, fourteen quarter casks of Teneriffe wine, of the value of one thousand dollars of like lawful money, and two thousand Spanish milled dollars, of the value of two thousand dollars of like lawful money, of the goods and chattels of certain citizens of the United States (to the jurors aforesaid as yet unknown) then and there being in the said schooner or vessel, under the care and custody, and in possession of the said Uriah Phillips Levy, as master of the said schooner or vessel, then and there upon the high seas aforesaid, near the said Isle of May, and out of the jurisdiction of any particular state, with force and arms as aforesaid, from the care, custody and possession of the said Uriah Phillips Levy, piratically and feloniously did steal, take and run away with; they (the said Samuel Tully and John Dalton) then and there being mariners of the said vessel, and in and on board the said vessel, upon the high seas as aforesaid, against the peace and dignity of the said United States, and the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present that after the commission of the said offenses, to wit, on the 15th of July, now last past, the said Samuel and John, the offenders aforesaid, were first brought into the Massachusetts district and that the said Massachusetts district is the district into which the said offenders were as aforesaid first brought. A true bill.

HUMPHREY DEVEREUX,

Foreman.

GEORGE BLAKE,

United States Attorney for Massachusetts District.28

[28. United States v. Tully, 28 Fed. Cas. No. 16.545.]

# FORM 123.

#### Policy Gambling and Having in Possession the Apparatus Therefor.

COURT OF GENERAL SESSIONS OF THE PEACE In and for the County of New York.

The People of the State of New York against Albert J. Adams.

The grand jury of the county of New York, by this indictment, accuse Albert J. Adams of the crime of knowingly having in his possession a writing, paper and document representing and being a record of a chance, share and interest in numbers sold in what is commonly called policy, committed as follows:

The said Albert J. Adams, late of the twentieth ward of the borough of Manhattan, of the city of New York, in the county of New York aforesaid, on the twelfth day of December, in the year of our Lord one thousand nine hundred and one, at the ward, borough and county aforesaid, feloniously did knowingly have in his possession a certain writing, paper and document representing and being a record of a chance, share and interest in numbers sold in what is commonly called policy, which said writing, paper and document is as follows, that is to say: Manifold books and sheets, being records of numbers sold and lottery policies sold, commonly known as a manifold book, a more particular description whereof is to the grand jury aforesaid unknown, and cannot now be given; against the form of the statute in such cases made and provided and against the peace of the people of the State of New York, and their dignity.

#### Second Count.

And the grand jury aforesaid, by this indictment, further accuse the said Albert J. Adams of the crime of knowingly having in his possession a paper, writing, print, numbers, device, policy slip and articles of a kind such as is commonly used in carrying on, promoting and playing the game commonly called policy, committed as follows:

The said Albert J. Adams, late of the ward, borough and county aforesaid, afterwards, to wit, on the day and in the year aforesaid, at the ward, borough and county aforesaid, feloniously did knowingly have in his possession a paper, print, writing, numbers, device, policy slip and articles of a kind such as is commonly used in carrying on, promoting and playing the game commonly called policy, which said paper, print, writing, numbers, device, policy slip and articles aforesaid is as follows: Manifold books and sheets, being records of numbers sold and lottery policies sold, and commonly called manifold books, policy slips, and being numbers alleged to have been drawn, and policy lists, being alleged records of alleged drawings, a more particular description whereof is to the grand jury aforesaid unknown, and cannot now be given; and against the form of the statute in such case made and pro-

vided and against the peace of the people of the State of New York and their dignity.

WILLIAM TRAVERS JEROME,

District Attorney.29

[29. In People v. Adams, 176 N. Y. 351, 68 N. E. 636, a judgment of conviction on the above indictment was affirmed. The indictment was under New York Pen. Code, § 344a.]

# FORM 124. Postal Laws-Violation of.

See forms for "Robbing United States Mails" for forms for such offenses. Southern District of New York, in the Second Circuit:

At a stated term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, begun and held at the city of New York, within and for the District and Circuit aforesaid, on the last Monday of February, in the year of our Lord one thousand eight hundred and fifty-nine, and continued by adjournment to and including the third day of March in the same year.

SOUTHERN DISTRICT OF NEW YORK, SS..

The jurors of the United States of America, within and for the district and Circuit aforesaid, on their oath present: That John Mulvaney, late of the city and county of New York, in the district and circuit aforesaid, laborer, heretofore, to wit, on the seventeenth day of January, in the year of our Lord one thousand eight hundred and fifty-nine, at the city of New York, in the Southern District aforesaid, and within the jurisdiction of this court, did open a letter which had been in the custody of a mail carrier, before it had been delivered to the person to whom it was directed, with a design to obstruct the correspondence, to pry into another's business and secrets, against the peace of the United States and their dignity, and against the form of the statute of the said United States in such case made and provided.

#### Second Count.

And the jurors aforesaid, on their oath aforesaid, do further present: That John Mulvaney, late of the city and county of New York, in the district and circuit aforesaid, laborer, heretofore, to wit, on the seventeenth day of January, in the year eighteen hundred and fifty-nine at New York, in the district and circuit aforesaid, and within the jurisdiction of this court, did destroy a certain letter which had been in custody of a mail carrier, before it had been delivered to the person to whom it was directed, with a design to obstruct the correspondence, to pry into another's business and secrets, against the peace of the United States and their dignity and against the form of the statute of the said United States in such case made and provided.

#### THEODORE LEDGWICK,

U. S. District Attorney.30

[30. United States v. Mulvaney, 4 Park. Cr. R. (N. Y.) 164. Form used in indictment for opening a letter, which had been in the custody of a mail carrier, before it was delivered to the person to whom it was directed.]

# FORM 125.

#### Rape.

MERCER OYER AND TERMINER AND GENEBAL JAIL DELIVERY. January Term, 1891.

MERCER COUNTY, TO WIT:

The grand inquest of the State of New Jersey, in and for the body of the county of Mercer, upon their respective oath

"Present, that John Farrell, late of the city of Trenton, in the said county of Mercer, on the fifth day of January, in the year of our Lord one thousand eight hundred and ninety-one, with force and arms, at the city of Trenton aforesaid, in the county aforesaid, and within the jurisdiction of this court, in and upon the body of one Mamie E. Morgan, in the peace of God and this State then and there being, an assault did make, and her, the said Mamie E. Morgan, being then and there a woman under the age of sixteen years, he, the said John Farrell, being then and there above the age of sixteen years, did unlawfully and carnally abuse and other wrongs to the said Mamie E. Morgan then and there did, to the great damage of the said Mamie E. Morgan.

"BAYARD STOCKTON,

Prosecutor of the Pleas."31

[31. Farrell v. State, 54 N. J. L. 416, — Atl. —, affirming a judgment of conviction on the above indictment and holding that the joinder of two or more distinct offenses in one count of an indictment is faulty but that where the acts imputed are component parts of the same offense, the pleading is not obnoxious to the charge of duplicity.]

#### FORM 126.

#### Rape.

KINGS COUNTY, SS.:

The jurors of the people of the State of New York, in and for the county of Kings, upon their oath present: That Joseph Jackson and John Dixon, now or late of the city of Brooklyn, in the county of Kings aforesaid, on the twenty-third day of August, in the year of our Lord one thousand eight hundred and fifty-six, at the town of Gravesend, and in the county of Kings aforesaid, in and upon the body of Catharine Sullivan, a woman of the age of ten years and upwards, in the peace of God and of the said people then and there being, with force and arms, did feloniously make an assault, and her, the said Catherine Sullivan, did then and there wickedly and feloniously and against her will, forcibly ravish and carnally and unlawfully know against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

R. C. UNDERHILL,

District Attorney.32

[32. People v. Jackson, 3 Park. Cr. R. (N. Y.) 391.]

# FORM 127.

# Rape-Attempt to Commit.

SUPREME COURT-NIAGARA COUNTY.

The People of the State of New York against William H. Davey.

The grand jury of the county of Niagara by this indictment accuse William H. Davey of the crime of an attempt to commit rape in the first degree, committed as follows, to wit:

That the said William H. Davey, on or about the 22nd day of June, 1903, at the city of Niagara Falls, within the county of Niagara, did then and there wilfully and feloniously, with force and arms, assault one Edith Brott, then and there being, and did then and there lay violent hands upon the said Edith Brott and did force her to lie across a chair upon her back and did then and there forcibly place his hands under the clothing of the said Edith Brott and tear the buttons therefrom and he, the said William H. Davey, did then and there by means of force and violence place his hands upon and against the privates of said Edith Brott, and insert his fingers into her privates, all of which was done by means of force and violence employed by him, the said William H. Davey, without the consent of said Edith Brott, against her will and consent, and was done by him, the said Davey, with the felonious intent of having sexual intercourse with said Edith Brott against her will and consent and of committing the crime of rape in the first degree upon said Edith Brott. That of all said acts done by him, the said Davey, as aforesaid, tended to but failed to effect the commission of the crime of rape in the first degree, and that by reason thereof the said Davey did then and there feloniously commit the crime of an attempt to commit the crime of rape in the first degree, contrary to the form of the statute in such case made and provided.

## Second Count.

And the grand jury aforesaid, by this indictment, further accuse the said William H. Davey of the crime of assault, second degree, committed as follows, to wit:

That the said William H. Davey on or about the 22nd day of June, 1903, at the city of Niagara Falls, within the county of Niagara, with intent to commit a felony upon the person of one Edith Brott, a female not his wife, to wit, the crime of rape, she then and there being, wilfully and feloniously and with force and arms did commit an assault upon her, the said Edith Brott, by violently and forcibly seizing her and compelling her to lie across a chair upon her back and did then and there forcibly place his hands under her clothing and tear the buttons therefrom, and he, the said William H. Davey, did then and there by means of force and violence place his hands upon and against the privates of said Edith Brott, and insert his finger into her privates, all of which was done by means of force and violence employed by him, the said William H. Davey, without the consent of said Edith Brott and against her will and consent, and was done by him, the said Davey, with

the felonious intent of having sexual intercourse with said Edith Brott, against her will and consent, and of committing the crime of rape in the first degree upon the said Edith Brott, contrary to the form of the statute in such case made and provided, being the same acts set forth in the first count of this indictment.

BURT G. STOCKWELL,

District Attorney of Niagara County.33

[33. In People v. Davey, 179 N. Y. 345, 72 N. E. 244, this form was used but a conviction was reversed on the ground of the erroneous admission of evidence.]

## FORM 128.

# Receiving Stolen Property.

SUPREME COURT—COUNTY OF CATTARAUGUS.

The People against Charles A. Doty.

The grand jury of the county of Cattaraugus, by this indictment, accult Charles A. Doty of the crime of knowingly and criminally receiving stolen property committed as follows: The said Charles A. Doty, on the 6th day of December, 1900, at the town of Salamanca, in this county, knowingly and wilfully, unlawfully and feloniously did buy, take and receive from one Louis Torge, Jr., one certain hide taken from a horned creature, of the value of six dollars, of the goods, chattels and personal property of The United States Leather Company of New Jersey, a corporation duly organized under the laws of the State of New Jersey, which said hide was then and there stolen property, and which then and there had been and which he, the said Charles A. Doty, then and there well knew, had lately before been stolen from the said The United States Leather Company of New Jersey at said town by the said Louis Torge, Jr., against the form of the statute in such case made and provided and against the peace of the people of the State of New York.

J. M. CONGDON,

District Attorney of Niagara County.33

[34. In People v. Doty, 175 N. Y. 164, 67 N. E. 303, a judgment of conviction on the above indictment was affirmed.]

# FORM 129.

#### Receiving Stolen Property.

CITY AND COUNTY OF NEW YORK, SS.:

The jurors of the people of the State of New York, in and for the body of the city and county of New York, upon their oath present:

That Charles Wills, late of the first ward of the city of New York, in the county of New York, aforesaid; William Conley, late of the same place, and James R. Wilson, late of the same place, on the fifth day of January, in the

year of our Lord one thousand eight hundred and fifty-six, with force and arms, at the ward, city and county aforesaid, fifty veils, of the value of five dollars each; fifty shirts, of the value of five dollars each; fifty pieces of edging, of the value of five dollars each; fifty pieces of inserting, of the value of five dollars each; fifty robes, of the value of five dollars each, and fifty waists of the value of five dollars each, of the goods and chattels of Aaron G. Crane, by some person to the jurors aforesaid unknown, then lately before feloniously stolen of the said Aaron G. Crane, unlawfully, unjustly and for the sake of wicked gain, did feloniously receive and have; the said Charles Wills, William Conley and James R. Wilson then and there well knowing the said goods and chattels to have been feloniously stolen, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That afterwards, to wit, on the day and in the year last aforesaid, the said Charles Wills, late of the ward, city and county aforesaid, with force and arms, at the ward, city and county aforesaid, fifty veils, of the value of five dollars each; fifty shirts, of the value of five dollars each; fifty pieces of edging, of the value of five dollars each; fifty pieces of inserting, of the value of five dollars each; fifty robes, of the value of five dollars each; fifty waists, of the value of five dollars each, of the goods and chattels of one Aaron G. Crane, by some person to the jurors aforesaid unknown, then lately before feloniously stolen of the said Aaron G. Crane, unlawfully, unjustly and for the sake of wicked gain, did feloniously and wilfully receive and have, the said Charles Wills then and there well knowing the said goods and chattels to have been feloniously stolen.

And the jurors aforesaid, upon their oath aforesaid, do further present: That William Conley and James R. Wilson, each late of the ward, city and county aforesaid, at the ward, city and county aforesaid, before the said felony and receiving stolen goods so as committed in form aforesaid, on the fifth day of January, in the year last aforesaid, did feloniously, wilfully and maliciously incite, move, procure, aid, counsel, hire and command the said Charles Wills the said felony and receiving stolen goods in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That afterwards, to wit, on the day and in the year last aforesaid, the said William Conley, late of the ward, city and county aforesaid, with force and arms, at the ward, city and county aforesaid, fifty veils, of the value of five dollars each; fifty shirts, of the value of five dollars each; fifty pieces of edging, of the value of five dollars each; fifty pieces of inserting, of the value of five dollars each; fifty

robes, of the value of five dollars each; fifty waists, of the value of five dollars each, of the goods and chattels of one Aaron G. Crane, by some person to the persons aforesaid unknown, then lately before feloniously stolen of the said Aaron G. Crane, unlawfully, unjustly and for the sake of wicked gain, did feloniously and wilfully receive and have; the said William Conley, then and there well knowing the said goods and chattels to have been feloniously stolen.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Charles Wills and James R. Wilson, each late of the ward, city and county aforesaid, before the said felony and receiving stolen goods was committed, in form aforesaid, to wit, on the fifth day of January, in the year aforesaid, at the ward, city and county aforesaid, did feloniously, wilfully and maliciously incite, move, procure, aid, counsel, hire and command the said James R. Wilson the said felony and receiving stolen goods, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That afterwards, to wit, on the day and in the year last aforesaid, the said James R. Wilson, late of the ward, city and county aforesaid, with force and arms, at the ward, city and county aforesaid, fifty veils, of the value of five dollars each; fifty shirts, of the value of five dollars each; fifty collars, of the value of five dollars each; fifty pieces of edging, of the value of five dollars each; fifty pieces of the value of five dollars each; fifty robes, of the value of five dollars each; fifty waists, of the value of five dollars each, of the goods and chattels of Aaron G. Crane, by some person to the jurors unknown, then lately before feloniously stolen of the said Aaron G. Crane, unlawfully, unjustly, and for the sake of wicked gain, did feloniously and wilfully receive and have, the said James R. Wilson then and there well knowing the said goods and chattels to have been feloniously stolen.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Charles Wills and William Conley, each late of the ward, city and county aforesaid, before the said felony and receiving stolen goods was committed in form aforesaid, to wit, on the fifth day of January, in the year last aforesaid, at the ward, city and county aforesaid, did feloniously, wilfully and maliciously incite, move, procure, aid, counsel, hire and command the said James R. Wilson the said felony and receiving stolen goods, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

# A. OAKLEY HALL,

District Attorney.25

[35. Wills v. People, 3 Park. Cr. R. (N. Y.) 473. Form for feloniously receiving and having stolen property, with counts charging some of the defendants as accessories.]

# FORM 130.

# Records-Removal, Concealing and Destruction of.

COURT OF GENERAL SESSIONS OF THE PEACE, In and for the County of New York.

The People of the State of New York against George E. Mills.

The grand jury of the county of New York, by this indictment, accuse George E. Mills of the crime of an attempt to commit the crime of wilfully and unlawfully removing, concealing and destroying records and documents filed and deposited in a public office by authority of law, committed as follows:

Heretofore, to wit, on the 25th day of March, in the year one thousand nine hundred and three, at the Borough of Manhattan, of the city of New York, in the county of New York aforesaid, the grand jury of the county of New York, theretofore duly drawn for the term of the Court of Geneal Sessions of the Peace, in and for the said county of New York, appointed to be held on the first Monday of March, in the year one thousand nine hundred and three, and duly empanelled and sworn, and then duly in session, duly presented to the said Court of General Sessions of the Peace in and for the said county, by one William G. Rockefeller, then being foreman of the said grand jury, duly appointed, qualified and acting as such, in the presence of the said grand jury, a certain indictment theretofore duly found by the said grand jury, endorsed a "True bill," and with the said endorsement signed by the said William G. Rockefeller, so being then and there such foreman as aforesaid, charging one Richard C. Flower with the crime of grand larceny in the first degree, which said indictment was then and there duly filed by authority of the law with one Edward R. Carroll, then and there and at all times herein mentioned being the clerk of the said court, and then and there duly deposited by him by like authority in his office in the Criminal Courts Building in the Borough of Manhattan, in the city and county of New York, the same being then and there and at all times herein mentioned a public office, and he being then and there and at all said times a public officer; and afterwards, to wit, on the 27th day of March, in the year aforesaid, at the borough and county aforesaid, the said grand jury, so drawn, empanelled and sworn as aforesaid, and then duly in session, duly presented to the said court, by the said William G. Rockefeller, then being its said foreman, so appointed, qualified and acting as such, in the presence of said grand jury, five other indictments, each theretofore duly found by the said grand jury, and duly endorsed and with the endorsement thereon duly signed as aforesaid, each of which said indictments charged the said Richard C. Flower with the crime of grand larceny in the first degree, each of which said indictments was then and there duly filed by authority of law with the said Edward R. Carroll, so being the clerk of the said court, as aforesaid, and was then and there duly deposited by him by like authority in his said office, all of which aforesaid indictments were then and there and at all times thereafter herein mentioned public records, papers and documents.

And afterwards, to wit, on the 3d day of April, in the year of our Lord one thousand nine hundred and three, the said George E. Mills, late of the Borough of Manhattan, of the city of New York, in the county of New York aforesaid, at the borough and county aforesaid, feloniously did wilfully and unlawfully attempt to remove, steal and destroy the said indictments so as aforesaid by authority of the law, filed with the said clerk of the said Court of General Sessions of the Peace in and for the county of New York, and deposited in his office, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

#### Second Count.

And the grand jury aforesaid, by this indictment, further accuse the said George E. Mills of the crime of an attempt to commit the crime of grand larceny in the second degree, committed as follows:

Heretofore, to wit, on the 25th day of March, in the year of our Lord one thousand nine hundred and three, at the borough and county aforesaid, the grand jury of the county of New York theretofore duly drawn, for the term of the Court of General Sessions of the Peace in and for the said county of New York, appointed to be held on the first Monday of March in the year one thousand nine hundred and three, and duly impanelled and sworn and then duly in session, duly presented to the said court of General Sessions of the Peace in and for the said county by one William G. Rockefeller, then being the foreman of the said grand jury, duly appointed, qualified and acting as such, in the presence of the said jury, a certain indictment theretofore duly found by the said grand jury, endorsed a "True bill," and with the said endorsement signed by the said William G. Rockefeller, so being then and there such foreman as aforesaid, charging one Richard C. Flower with the crime of grand larceny in the first degree, which said indictment was then and there duly filed by authority of law with one Edward R. Carroll, then and there and at all times herein mentioned being the clerk of the said court, and then and there duly deposited by him by like authority in his office in the Criminal Courts Building, in the Borough of Manhattan, in the city and county of New York, the same being then and there and at all the times herein mentioned a public office, and he being then and there and at all said times a public officer; and afterwards, to wit, on the 27th day of March, in the year aforesaid, at the borough and county aforesaid, the said grand jury so drawn, impanelled and sworn as aforesaid, and then duly in session, duly presented to the said court, by the said William G. Rockefeller, then being its said foreman, so appointed, qualified and acting as such, in the presence of the said grand jury, five other indictments, each theretofore duly found by the said grand jury and duly endorsed, and with the endorsement thereon duly signed as aforesaid, each of which said indictments charged the said Richard C. Flower with the crime of grand larceny in the first degree, each of which said indictments was then and there duly filed by authority of law with the

said Edward R. Carroll, so being the clerk of the said court as aforesaid, and was then and there duly deposited by him by like authority in his said office. all of which aforesaid indictments were then and there and at all times thereafter herein mentioned records of the said Court of General Sessions of the Peace in and for the said county of New York, and of the said clerk thereof, and writings, instruments and records kept, filed and deposited according to law with, and in, the keeping of the said clerk, and as follows:

And afterwards, to wit, on the 3d day of April, in the year of our Lord one thousand nine hundred and three, at the borough and county aforesaid, the said George E. Mills, late of the borough and county aforesaid, with force and arms, the said six indictments herein above described then and there being found, then and there feloniously did attempt to steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

WILLIAM TRAVERS JEROME,

District Attorney.36

[36. In People v. Mills, 178 N. Y. 274, 70 N. E. 786, a judgment of conviction on the above indictment was sustained.]

# FORM 131.

# Removing Dead Body of a Human Being Feloniously.

STATE OF NEW YORK, ONTARIO COUNTY, SS.:

The jurors for the people of the State of New York and for the body of the county of Ontario, to wit: Jonas M. Wheeler, etc., being sworn and charged to inquire for the people of the said State, and for the body of the county aforesaid, upon their oath, present that John C. Weed, Alanson R. Simons and Judson H. Graves, late of the town of Bristol, in the county aforesaid, on the 1st day of June, 1858, with force and arms, at the town of Bristol, in the county aforesaid, a graveyard situated in the said town of Bristol, county of Ontario aforesaid, did enter, and the grave therein in which the body of one Martha J. Brockelbank, deceased, had lately before then been interred and then was, with force and arms, unlawfully, voluntarily, wilfully and indecently, did dig, open and afterward, to wit, on the same day and year aforesaid, with force and arms, at the town of Bristol, in the county aforesaid, the dead body of her, the said Martha J. Brockelbank, out of the grave aforesaid, unlawfully, feloniously and indecently did take and carry away, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John C. Weed, Alanson R. Simmons and Judson H. Graves, on the day and year last aforesaid, and at the town, county and State aforesaid, a

graveyard situated in the said town of Bristol and county aforesaid, did enter and the grave in which the body of one Martha J. Brockelbank, deceased, had lately before then been interred and then was, with force and arms, unlawfully, voluntarily and wilfully, feloniously and indecently, did dig open and afterwards, to wit, on the same day and year aforesaid, with force and arms, at the town of Bristol, in the county and State aforesaid, the dead body of her, the said Martha J. Brockelbank, out of the grave aforesaid, unlawfully, feloniously and indecently did take, remove and carry away for the purpose of dissection, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John C. Weed, Alanson R. Simmons and Judson H. Graves, on the day and year aforesaid, at the town, county and State aforesaid, a graveyard, situated in the said town of Bristol, county aforesaid, unlawfully did enter, and the grave there in which the body of one Martha J. Brockelbank, deceased, had lately before then been interred, and then was with force and arms, unlawfully, voluntarily, wilfully, feloniously and indecently did dig open, and afterwards, to wit, on the same day and year aforesaid, with force and arms, at the town and county aforesaid, the dead body of her, the said Martha J. Brockelbank, out of the grave aforesaid, unlawfully, feloniously and indecently did take, remove and carry away, for the purpose of selling the same, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John C. Weed, Alanson R. Simmons and Judson H. Graves afterward, to wit, on the same day and year last aforesaid, at the town of Bristol, in the county aforesaid, the dead body of one Martha J. Brockelbank, deceased, so as aforesaid, unlawfully, feloniously and indecently dug up from the grave aforesaid and unlawfully and indecently taken and carried away as aforesaid, from the said grave, unlawfully, feloniously and indecently did receive for the purpose of dissection they, the said John S. Weed, Alanson R. Simmons and Judson H. Graves, then and there well knowing the said dead body of the said Martha J. Brockelbank, deceased, to have been so as aforesaid, unlawfully, feloniously and indecently dug up, taken and carried away from the grave aforesaid, for the purpose of dissection, against the peace of the people of the State of New York, and their dignity, and against the form of the statute in such case made and provided.

WM. H. SMITH, District Attorney.37

[37. People v. Graves, 5 Park. Cr. R. (N. Y.) 135, holding that an indictment for feloniously disinterring the body of a Martha J. Brockelbank was not defective in not alleging that she was a human being and also that where the burial place was described as "a graveyard in the town of Bristol, Ontario county" it was no material defect that the particular graveyard was not designated.

# FORM 132.

# Robbing United States Mail.

In the Circuit Court of the United States of America, holden in and for the Eastern District of Pennsylvania, of April sessions, in the year of our Lord one thousand eight hundred and thirty. Eastern District of Pennsylvania, to wit: The grand inquest of the United States of America, inquiring for the Eastern District of Pennsylvania, upon their oaths and affirmations respectively, do present: That James Porter, otherwise called James May, late of the Eastern District aforesaid, yeoman; and George Wilson, late of the Eastern District aforesaid, yeoman, on the 6th day of December, in the year of our Lord one thousand eight hundred and twenty-nine, at the Eastern District aforesaid, and within the jurisdiction of this court, with force and arms in and upon one Samuel M'Crea, in the peace of God and of the United States of America then and there being, and then and there being a carrier of the mail of the United States of America, and then and there having the custody of the said mail, and then and there proceeding with said mail from the city of Philadelphia to the borough of Reading, feloniously did make an assault, and him, the said carrier, did then and there of the said mail feloniously rob, and in then and there effecting the said robbery did then and there by the use of dangerous weapons, to wit, pistols, put in jeopardy the life of the said Samuel M'Crea, he, the said Samuel M'Crea then and there being as aforesaid, the carrier of the said mail of the United States, and having then and there the custody thereof, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America. And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said James Porter, otherwise called James May, and the said George Wilson, afterwards, to wit, on the same day and year aforesaid, at the Eastern District aforesaid, and within the jurisdiction of this court, with force and arms in and upon the said Samuel M'Crea, then and there being a carrier of the mail of the United States, and then and there having the custody of the said mail from the city of Philadelphia to the borough of Reading, feloniously did make an assault, and him, the said Samuel M'Crea, in bodily fear and danger of his life then and there feloniously did put, and the said mail of the United States, from him, the said Samuel M'Crea, then and there, as aforesaid, a carrier of the mail of the United States, and then and there having the custody thereof, then and there feloniously, violently and against his will, did steal, take and carry away, and in then and there effecting the robbery so as aforesaid described, did then and there by the use of dangerous weapons, to wit, pistols, put in jeopardy the life of the said Samuel M'Crea, then and there the carrier of the mail of the United States, and then and there having the custody thereof, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America. And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that

the said James Porter, otherwise called James May, and the said George Wilson, afterwards, to wit, on the same day and year aforesaid, at the Eastern District aforesaid, and within the jurisdiction of this court, with force and arms, in and upon the said Samuel M'Crea, then and there being a carrier of the mail of the United States, and then and there having the custody of the said mail, feloniously did make an assault and the life of him, the said Samuel M'Crea, by the use of dangerous weapons, did then and there put in jeopardy, and the said mail of the United States from him, the said Samuel M'Crea, then and there, feloniously, violently and against the will of him, the said Samuel M'Crea, did steal, take and carry away, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

#### GEORGE M. DALLAS,

Attorney of the United States for the Eastern District of Pennsylvania.

True bill.

JOSEPH WATSON,

Foreman.38

April 13, 1820.

[38. United States v. Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78. Form used in indicting for robbing the mail of the United States with the use of dangerous weapons and putting the life of the carrier in jeopardy.]

# FORM 133.

# Robbing United States Mail.

In the Circuit Court of the United States of America for the Fourth Circuit, held at the city of Baltimore, in and for the Maryland District.

"MARYLAND DISTRICT, TO WIT: The grand inquest of the United States of America for the Fourth Circuit, inquiring for the body of the Maryland District upon their oath do present, that Joseph Thompson Hare, late of the said district, yeoman, together with a certain Lewis Hare and a certain John Alexander, on the eleventh day of March, in the year eighteen hundred and eighteen, in the night of the same day, in the public highway at Harford county, at the district aforesaid, in and upon one David Boyer, then and there being the carrier of the mail of the said United States, and the person entrusted therewith, and in the peace of God and of the said United States then and there being, with force and arms, at the district aforesaid, feloniously did make an assault, and him, the said David Boyer, in bodily fear and danger of his life in the highway aforesaid, then and there did put, and with the use of certain dangerous weapons, to wit, pistols and dirks, which the said Joseph Thompson Hare then and there in his hands held, he, the said Joseph, did put in jeopardy the life of said David Boyer, he, the said David Boyer, then and there being entrusted with, and having the custody of the said mail of the

said United States, and the mail aforesaid, so entrusted and in the custody as aforesaid of said Boyer, certain bank bills, letters, and packets, to the jurors aforesaid unknown, belonging to certain persons to the jurors aforesaid unknown, from the personal custody and care of the said David Boyer, and against his will in the highway aforesaid, at the district aforesaid, then and there feloniously did rob, steal, take and carry away, against the form of the statute of the said United States in such cases made and provided and against the peace, government, and dignity of the said United States of America.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Joseph Thompson Hare, together with the said John Alexander and Lewis Hare, on the eleventh day of March, in the year aforesaid, in the night of the same day, in the public highway at Harford county, at the district aforesaid, in and upon David Boyer, he then and there being the carrier of the mail of the said United States, and the person entrusted therewith, and in the peace of God and of the said United States then and there being, with force and arms, at the district aforesaid, feloniously did make an assault, and him, the said David Boyer, in bodily fear and danger of his life, in the said public highway, then and there, and with the use of certain dangerous weapons, to wit, pistols and dirks, which the said Joseph Thompson Hare then and there held in his hands, the said Joseph Thompson Hare did put in jeopardy the life of said David Boyer, then and there being entrusted with, and having the custody of said mail, and the said mail of the United States from the custody, possession, and care of said David Boyer, and against the will of said David Boyer, in the highway aforesaid, at the district aforesaid, did then and there feloniously and violently rob, steal, take, and carry away, against the form of the statute of the said United States of America in such cases made and provided, and against the peace, government, and dignity of the said United States of America.

And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Joseph Thompson Hare, together with the said John Alexander and Lewis Hare, on the eleventh day of March, in the year aforesaid, in the night of the same day, at Harford county, in the district aforesaid, in the public highway, in and upon said Boyer, then and there in the peace of God and the said United States being, and then and there being the carrier of the mail of the said United States, and the person entrusted therewith, at the district aforesaid, feloniously did make an assault, and him, the said David Boyer, then and there having the custody of the said mail of the United States, in bodily fear and danger of his life, then and there feloniously did put, and from the custody and possession of said David Boyer, and against the will of said David Boyer, in the highway aforesaid, at the district aforesaid, feloniously and violently did rob, steal, take, and carry away the said mail of the said United States, then and there containing sundry letters, bank bills, and packets, to the jurors aforesaid unknown, belonging to certain persons to the jurors aforesaid unknown, contrary to the form of the statute of

the said United States in such cases made and provided and against the peace, government and dignity of the said United States of America.

#### ELIAS GLENN,

District Attorney of the United States for Maryland District.39

[39. United States v. Hare, 2 Wheeler's Crim. Cas. (N. Y.) 283, 284.]

# FORM 134.

## Robbery.

CITY AND COUNTY OF NEW YORK, SS..

The jurors of the people of the State of New York, in and for the body of the city and county of New York, upon their oath present:

That Rosanna Quinlan, late of the first ward of the city of New York, in the county of New York aforesaid, James Quinlan, Margaret E. M. Smith, and Catharine Kinsley, late of the same place, on the fourteenth day of October, in the year of our Lord one thousand eight hundred and sixty-two, at the ward, city and county aforesaid, with force and arms, in and upon one Maria Brannigan, in the peace of the said people then and there being, feloniously did make an assault, and bank bills, of bank to the jurors aforesaid unknown, and of a number and denomination to the jurors aforesaid unknown, of the value of forty-nine dollars, of the goods, chattels, and personal property of the said Maria Brannigan, from the person of said Maria Brannigan, and against the will and by violence to the person of said Maria Brannigan, then and there violently and feloniously did rob, steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.40

A. OAKEY HALL, District Attorney.

[40. Form of an indictment for robbery in the first degree. Quinlan v. People, 6 Park. Cr. R. (N. Y.) 9, 10, holding where in an indictment for robbery in the first degree, the prisoner was charged with taking "bank bill of banks, to the jurors unknown, and of a number and denomination to the jurors aforesaid unknown, of the value of forty-nine dollars, &c., &c.," that the allegation was sufficient.

# FORM 135.

#### Seduction.

STATE OF NEW YORK, YATES COUNTY, SS.:

The jurors of the people of the State of New York, and for the body of the county of Yates aforesaid, upon their oath do present, that Edward Kenyon,

late of the town of Jerusalem, in the county of Yates aforesaid, heretofore, to wit, on the second day of May, in the year of our Lord one thousand eight hundred and sixty, at the town of Jerusalem, in the county of Yates aforesaid, unlawfully, wilfully and feloniously, under and by means of promise of marriage, did seduce and have illicit sexual intercourse and connection with one Mary Chissom, he, the said Edgar Kenyon, being then and there a man, and the said Mary Chissom then and there being an unmarried female of previous chaste character, contrary to the form of the statute in such case made and provided, and against the peace of the people of the State of New York, their laws and dignity.

And their jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on the twentieth day of March, in the year of our Lord one thousand eight hundred and sixty, at the town of Jerusalem, in the county of Yates aforesaid, the said Edgar Kenyon undertook and promised to and with one Mary Chissom, who was then and there an unmarried female of marriageable age and condition, to marry her, the said Mary Chissom, whenever he, the said Edgar Kenyon, should be thereunto afterwards requested, and mutual promises of marriage were then and there made by and between the said Edgar Kenyon and the said Mary Chissom.

And the jurors aforesaid, upon their oaths aforesaid, do further say, that after the making of the said promise of marriage by the said Edgar Kenyon, to wit, on the second day of May, in year of our Lord one thousand eight hundred and sixty, at the town and in the county aforesaid, he, the said Edgar Kenyon, did, under and by means of his said promise of marriage, wilfully and feloniously seduce and have illicit connection with the said Mary Chissom, he, the said Edgar Kenyon, at the time aforesaid of the making of the promise of marriage aforesaid, and also at the time last aforesaid of the seduction and illicit connection aforesaid, at the town and in the county aforesaid, being a man, and she, the said Mary Chissom, at the time aforesaid of the making the promise of marriage aforesaid, and also at the time aforesaid of the seduction and illicit connection aforesaid, at the town and in the county aforesaid, being an unmarried female of previous chaste character, contrary to the form of the statute in such case made and provided, and against the peace of the people of the State of New York, their laws and dignity.

And the jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the twentieth day of March, in the year of our Lord one thousand eight hundred and sixty, at the town of Jerusalem, in the said county of Yates, the said Edgar Kenyon undertook to and promised to and with one Mary Chissom, who then and there was an unmarried female of marriageable age and condition, to marry her, the said Mary Chissom, and mutual promises of marriage were then and there made and entered into by and between the said Edgar and Mary.

And the jurors aforesaid, upon their oath, do further say: That after the making the said promise of marriage by the said Edgar Kenyon, he, the said

Edgar Kenyon, under and by means of his said promise of marriage, wilfully and feloniously did seduce and have illicit connection with the said Mary Chissom, she being then and there an unmarried female of previous chaste character, contrary to the form of the statute in such case made and provided, and against the peace of the people of the State of New York, their laws and dignity.

H. M. STEWART,

District Attorney.41

[41. People v. Kenyon, 5 Park. Cr. R. (N. Y.) 255.]

# FORM 136.

#### Seduction.

STATE OF NEW YORK, COUNTY OF ST. LAWRENCE, SS.:

At a Court of Oyer and Terminer, held at the court house, in the town of Canton, in and for the county of St. Lawrence, on the 15th day of February, in the year of our Lord one thousand eight hundred and fifty-nine, before the Honorable Amaziah B. James, Justice of the Supreme Court William C. Brown, County Judge, and Joseph Barnes and Silas Baldwin, Esquires, Justices of the Peace of said county, assigned to inquire by the oath of good and lawful men of said county, of all crimes and misdemeanors committed or triable in said county, and to hear, try, determine and furnish all offenders according to law.

#### ST. LAWRENCE COUNTY, SS.:

The jurors of the people of the State of New York, in and for the body of the county of St. Lawrence, to wit, Elihu M. Dana, etc., etc., good and lawful men of said county, now here sworn and charged to inquire for the said people in and for the body of the said county, upon their oath do present:

That John Grant, late of the town of Norfolk, in the county of St. Lawrence, heretofore, to wit, on the 20th day of July, in the year of our Lord one thousand eight hundred and fifty-eight, at the town of Norfolk, in the county of St. Lawrence, unlawfully, wilfully and feloniously, under and by means of promise of marriage, did seduce and have illicit sexual intercourse and connection with one Ruth Amelia Rose, she, the said Ruth Amelia, then and there being an unmarried female of previous chaste character, against the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oaths, do further present: That heretofore, to wit, on the 20th day of July, in the year 1858, at the town of Norfolk, in said county of St. Lawrence, the said John Grant undertook and promised to, and with one Ruth Amelia Rose, who was then and there an unmarried female of marriageable age and condition, to marry her, the said Ruth Amelia, whenever he, the said John, should be thereunto afterward re-

quested, and mutual promises of marriage were then and there made and entered into by and between the said John and the said Ruth Amelia.

And the jurors aforesaid, upon their oaths, do further say: That after making the said promise of marriage by the said John Grant, he, the said John Grant, under and by means of his said promise of marriage, wilfully and feloniously did seduce and have illicit connection with said Ruth Amelia Rose, she, the said Ruth Amelia, being then and there an unmarried female of previous chaste character, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York.

THOMAS V. RUSSELL,

District Attorney.42

[42. Grant v. People, 4 Park. Cr. R. (N. Y.) 527.]

# FORM 137.

# Selling a Diseased Cow in the Public Market.

London, to wit.

The jurors for our Lady the Queen, upon their oath present, that J. L. P., late of London, laborer, on the 1st day of April, in the 13th year of the reign of our Sovereign Lady Victoria, the now Queen, at London (that is to say), at the Parish of St. Sepulchre, in the ward of Farringdon Without, in London aforesaid, was possessed of a certain cow, which said cow was then and there infected with a contagious, infectious and dangerous disease; and that the said J. L. P., well knowing the premises, afterwards, and whilst the said cow of the said J. L. P. was so infected as aforesaid, on the day and year aforesaid, with force and arms, at the parish and in the ward aforesaid, in London aforesaid, unlawfully, wickedly, wilfully, maliciously, and injuriously, did drive and bring, and cause and procure to be driven and brought the said cow so infected as aforesaid, through and along divers public streets and ways where certain other cattle of the liege subjects of our said Lady the Queen were then passing unto and into a certain market, called Smithfield Market, situate and being in the city of London aforesaid, during the period that the liege subjects of our said Lady the Queen were then and there holding the said market, which was then and there public and open to all the liege subjects of our said Lady the Queen, for the purpose of buying and selling their cattle therein, and that he, the said J. L. P., well knowing the premises as aforesaid, kept and continued the said cow so infected as aforesaid, in the said market during the period of the holding the same as aforesaid, for a long space of time, to wit, for the space of twelve hours then next following; and in which said market, during the whole of the said last mentioned period, there were, and of right ought to have been, divers other cows and cattle of certain liege subjects of our said Lady the Queen then and there passing and being. By means of which said several premises, the said last mentioned cows 

and cattle so passing and being along and in the said market, became and were liable to be infected by the contagious, infectious and dangerous disease with which the said cow of the said J. L. P. was infected as aforesaid, to the damage, etc., to the evil example, etc., and against the peace of our Lady the Queen, her crown and dignity.

#### Second Count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on the day and year aforesaid, at the parish and in the ward aforesaid, in London aforesaid, there was, and from time immemorial hath been, and still is, a certain public market, called Smithfield Market, where butchers and other liege subjects of our said Lady the Queen assemble and meet together for the purpose of buying cattle to be subsequently slaughtered by them for the food of certain others of the liege subjects of our said Lady the Queen, and that afterwards, to wit, on the day and year aforesaid, at the parish and in the ward aforesaid, in London aforesaid, the said J. L. P. was possessed of one other cow, then and there infected with a contagious, infectious and dangerous disease; and that the said J. L. P., well knowing the said last mentioned premises, afterwards, and whilst the said last mentioned cow of the said J. L. P. was so infected as aforesaid, on the day and year aforesaid, with force and arms, at the parish and in the ward aforesaid, in London aforesaid, unlawfully, wickedly, wilfully, maliciously, and injuriously, did drive and bring, and cause and procure to be driven and brought, the said last mentioned cow, so infected as aforesaid, unto and into the said last mentioned market with the intention of selling and disposing of the same to the said butchers and others; and that the same might be bought and subsequently slaughtered for the food of certain liege subjects of our said Lady the Queen; and that he, the said J. L. P., did then and there unlawfully, wickedly, wilfully, maliciously, and injuriously, and for his own lucre and gain expose to sale, and cause and procure to be exposed to sale, the said last mentioned cow so infected as aforesaid, in the said public market, with the intention and for the purpose aforesaid, the said J. L. P. then and there well knowing that the said cow, so brought into the said public market and exposed to sale as aforesaid, would, if slaughtered, be unfit and unwholesome for food, and greatly prejudicial for the health of the liege subjects of our said Lady the Queen, eating and consuming the same, to the damage, etc., to the evil example, etc., and against the peace of our Lady the Queen, her crown and dignity.

#### Third Count.

. And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on the day and year aforesaid, at the parish and in the ward aforesaid, in London aforesaid, there was, and from time immemorial hath been, and still is, a certain public and open market, called Smithfield Market, where butchers and other liege subjects of our said Lady the Queen have been used and accustomed to assemble and meet together, and where divers and very many butchers and other liege subjects of our said Lady

the Queen were then assembled and met together for the purpose of buying cattle, to be subsequently slaughtered by them for human food, to wit, for the food of certain others of the liege subjects of our said Lady the Queen, and that afterwards, to wit, on the day and year aforesaid, in the said public and open market, at the parish and in the ward aforesaid, in London aforesaid, the said J. L. P. was possessed of one other cow, which was then and there infected with a loathsome, deadly and dangerous disease, and which said last mentioned cow he, the said J. L. P., then and there well knew would, if slaughtered, be unfit and unwholesome for human food, and greatly prejudicial to the health of any of the liege subjects of our said Lady the Queen who might eat and consume the same; and he, the said J. L. P., well knowing the said last mentioned premises, afterwards, and whilst the said last mentioned cow of the said J. L. P. was so infected with the said disease as aforesaid, on the day and year aforesaid, with force and arms, at the parish and in the ward aforesaid, in London aforesaid, unlawfully, wickedly, wilfully, maliciously, and injuriously, and for his own lucre and gain, did expose to sale, and cause and procure to be exposed to sale, in the said public and open market, the last mentioned cow which was so then and there infected with the said disease as aforesaid, with the intention of selling and disposing of the same to the said butchers and others so then and there assembled and met together as aforesaid, and that the same might be bought and subsequently slaughtered for human food, to wit, for the food of certain liege subjects of our said Lady the Queen, he, the said J. L. P., then and there knowing that the said last mentioned cow, so then and there exposed to sale as aforesaid, would, if slaughtered, be unfit and unwholesome for human food, and greatly prejudicial to the health of the liege subjects of our said Lady the Queen who might eat and consume the same, to the damage, etc., to the evil example, etc., and against the peace of our said Lady the Queen, her crown and dignity.

#### Fourth Count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on the day and year aforesaid, at the parish and in the ward aforesaid, in London aforesaid, there was, and from time immemorial hath been, and still is, a certain public and open market, called Smithfield Market, where butchers and other liege subjects of our said Lady the Queen have been used and accustomed to assemble and meet together, and where divers and very many butchers and other liege subjects of our said Lady the Queen were then assembled and met together for the purpose of buying cattle, to be subsequently slaughtered by them for human food, to wit, for food of certain others of the liege subjects of our said Lady the Queen, and that afterwards, to wit, on the day and year aforesaid, in the said public and open market, at the parish and in the ward aforesaid, in London aforesaid, the said J. L. P. was possessed of one other cow, which was then and there infected with a loathsome, deadly and dangerous disease, and which said last mentioned cow he, the said J. L. P., then and there well knew would,

if slaughtered, be unfit and unwholesome for human food and greatly prejudicial to the health of any of the liege subjects of our said Lady the Queen who might eat and consume the same, and that he, the said J. L. P., well knowing the said last mentioned premises, afterwards, and whilst the said last mentioned cow of the said J. L. P. was infected with the said disease as aforesaid, on the day and year aforesaid, with force and arms, at the parish and in the ward aforesaid, in London aforesaid, unlawfully, wickedly, wilfully, maliciously and injuriously, and for his own lucre and gain, did expose to sale in the said public and open market, and did then and there sell the said last mentioned cow, which was so then and there infected with the said disease as aforesaid, to a certain butcher, to wit, one G. G., in order that the same might be subsequently slaughtered for human food, to wit, for the food of certain liege subjects of our said Lady the Queen, he, the said J. L. P., then and there well knowing that the said last mentioned cow, so then and there sold as aforesaid, would, if slaughtered, be unfit and unwholesome for human food, and greatly prejudicial to the health of the liege subjects of our said Lady the Queen who might eat and consume the same, to the damage, etc., to the evil example, etc., and against the peace of our Lady the Queen, her crown and dignity.43

[43. 4 Cox Cr. Cas., Appendix XIV.]

# FORM 138.

#### Shooting at the Queen with Intent to Injure Her.

CENTRAL CRIMINAL COURT, TO WIT:

The jurors of our Lady the Queen upon their oath present, That William Hamilton, late of the parish of St. Martin-in-the-Fields, in the city of Westminster, laborer, on the 19th day of May, in the year of our Lord 1849, at the parish aforesaid, in the said city of Westminster, and within the jurisdiction of the said court, a certain pistol then and there containing a certain explosive material, to wit, gunpowder, which he, the said W. H., in his right hand then and there had and held, unlawfully, wilfully, knowingly and maliciously did discharge at the person of our Lady the Queen, with intent thereby then and there to injure the person of our said Lady the Queen, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

#### Second Count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. H., on the day and year aforesaid, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, a certain pistol then and therein containing a certain explosive material, to wit, gunpowder, which said last mentioned pistol he, the said W. H., in his right hand then and there had and held, unlawfully, wilfully, knowingly and ma-

liciously did discharge near to the person of our said Lady the Queen, with intent thereby then and there to injure the person of our said Lady the Queen, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

#### Third Count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. H., on the day and year aforesaid, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, a certain pistol then and there containing a certain explosive material, to wit, gunpowder, which said last mentioned pistol he, the said W. H., in his right hand then and there had and held, unlawfully, wilfully, knowingly and maliciously did discharge at the person of our Lady the Queen, with intent thereby then and there to break the public peace, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

#### Fourth Count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. H., on the day and year aforesaid, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, a certain pistol then and there containing a certain explosive material, to wit, gunpowder, which said last mentioned pistol, he, the said W. H., in his right hand then and there had and held, unlawfully, wilfully, knowingly and maliciously did discharge near to the person of our said Lady the Queen, with intent thereby then and there to break the public peace, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

#### Fifth Count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. H., on the day and year aforesaid, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, a certain pistol then and there containing a certain explosive material, to wit, gunpowder, which said last mentioned pistol he, the said W. H., in his right hand then and there had and held, unlawfully, wilfully, knowingly and maliciously did discharge at the person of our Lady the Queen, with intent thereby then and there to alarm our said Lady the Queen, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

#### Sixth Count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. H., on the day and year aforesaid, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, a certain pistol then and there containing a certain explosive material, to wit,

gunpowder, which said last mentioned pistol he, the said W. H., in the right hand then and there had and held, unlawfully, wilfully, knowingly and maliciously did discharge near to the person of our Lady the Queen, with intent thereby then and there to alarm our said Lady the Queen, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

[44. 4 Cox Cr. Cas., Appendix V.]

#### FORM 139.

#### Shooting with Intent to Kill.

IN THE CRIMINAL COURT OF LEAVENWORTH COUNTY.
The State of Kansas v. John Millar.

THE STATE OF KANSAS, LEAVENWORTH COUNTY, SS.:

The grand jurors for the State of Kansas, and in and of the county of Leavenworth, duly empanelled, sworn and charged to inquire within and for the county of Leavenworth in the name and by the authority of the State of Kansas, upon their solemn oaths, do present, that John Millar, late of said county, at said county of Leavenworth, and within the jurisdiction of the court, on the 7th day of January, A. D. 1863, on purpose and of his malice aforethought, did shoot one George Stigers, with a certain gun, the said gun being then and there loaded with gunpowder and divers, to wit, sixty shot, with the intent him, the said George Stigers, then and there to kill, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Kansas. And the jurors aforesaid, upon their oaths aforesaid, do further present, that John Millar late of said county, at said county Leavenworth, and within the jurisdiction of this court, on the 7th day of January, A. D. 1863, on purpose, and of his malice aforethought and feloniously did shoot at one George Stigers, with a certain gun, the said gun being then and there charged with gunpowder and divers, to wit, sixty leaden shot, with the intent him, the said George Stigers, then and there on purpose, feloniously, and of his malice aforethought, to kill, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Kansas.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that John Millar, late of said county, at said county of Leavenworth, and within the jurisdiction of this court, on the 7th day of January, A. D. 1863, on purpose, feloniously, and of his malice aforethought, did shoot one George Stigers in and upon the right arm and right side of the breast of him, the said George Stigers, with a certain gun, the said gun being then and there charged with gunpowder and divers, to wit, sixty leaden shot, which said gun, he, the said John Millar, then and there in both of his hands had and

held, with the intent him, the said George Stigers, then and there on purpose, feloniously, and of his malice aforethought, to kill, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Kansas.

THOMAS FENLON,

District Att'y, First Judicial District.45

[45. Millar v. State, 2 Kan. 174, 176.]

#### FORM 140.

#### Treason.

VIRGINIA DISTRICT. In the Circuit Court of the United States of America in and for the Fifth Circuit and Virginia District. The grand inquest of the United States of America for the Virginia District, upon their oath, do present, that Aaron Burr, late of the city of New York, and State of New York, attorney at law, being an inhabitant of, and residing within the United States, and under the protection of the laws of the United States, and owing allegiance and fidelity to the same United States, not having the fear of God before his eyes, nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the devil, wickedly devising and intending the peace and tranquility of the said United States to disturb and to stir, move, and excite insurrection, rebellion and war against the said United States on the tenth day of December, in the year of Christ one thousand eight hundred and six, at a certain place called and known by the name of 'Blannerhassett's Island,' in the county of Wood, and district of Virginia aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, falsely, maliciously and traitorously did compass, imagine and intend to raise and levy war, insurrection and rebellion against the said United States, and in order to fulfil and bring to effect the said traitorous compassings, imaginations and intentions him, the said Aaron Burr, he, the said Aaron Burr, afterwards, to wit, on the said tenth day of December, in the year one thousand eight hundred and six, aforesaid, at the said island called 'Blannerhassett's Island' as aforesaid, in the county of Wood aforesaid, in the district of Virginia aforesaid, and within the jurisdiction of this court, with a great multitude of persons whose names at present are unknown to the grand inquest aforesaid, to a great number, to wit, to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords and dirks, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United State's, and then and there with force and arms did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said

United States, and then and there, that is to say, in the day and in the year aforesaid, at the island aforesaid, commonly called 'Blennerhassett's Island,' in the county aforesaid of Wood, within the Virginia district, and the jurisdiction of this court, in pursuance of such their traitorous intentions and purposes aforesaid, he, the said Aaron Burr, with the said persons so as aforesaid, traitorously assembled and armed and arrayed in manner aforesaid, most wickedly, maliciously and traitorously did ordain, prepare and levy war against the said United States, contrary to the duty of their said allegiance and fidelity, against the constitution, peace and dignity of the said United States, and against the form of the act of the Congress of the said United States in such case made and provided. And the grand inquest of the United States of America, for the Virginia district, upon their oaths aforesaid, do further present, that the said Aaron Burr, late of the city of New York, and State of New York, attorney at law, being an inhabitant of and residing within the United States, and under the protection of the laws of the United States, and owing allegiance and fidelity to the same United States, not having the fear of God before his eyes, nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the devil, wickedly devising and intending the peace and tranquility of the said United States to disturb and to stir, move and excite insurrection, rebellion and war against the said United States, on the eleventh day of December, in the year of our Lord one thousand eight hundred and six, at a certain place called and known by the name of 'Blannerhassett's Island,' in the county of Wood, and district of Virginia aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, falsely, maliciously and traitorously did compass, imagine and intend to raise and levy war, insurrection and rebellion against the said United States; and in order to fulfil and bring to effect the said traitorous compassings, imaginations and intentions of him, the said Aaron Burr, he, the said Aaron Burr, afterwards, to wit, on the said last mentioned day of December, in the year one thousand eight hundred and six aforesaid, at a certain place called and known by the name of 'Blannerhassett's Island,' in the said county of Wood, in the district of Virginia aforesaid, and within the jurisdiction of this court, with one other great multitude of persons whose names at present are unknown to the grand inquest aforesaid, to a great number, to wit, to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords and dirks, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States, and then and there with force and arms did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said United States, and then and there, that is to say, on the day and in the year last mentioned, at the island aforesaid, in the county of Wood aforesaid, in the Virginia district, and within the jurisdiction of this court, in pursuance of such, their traitorous intentions and purposes

aforesaid, he, the said Aaron Burr, with the said persons so as aforesaid traitorously assembled, and armed and arrayed in manner aforesaid, most wickedly, maliciously and traitorously did ordain, prepare and levy war against the said United States, and further to fulfil and carry into effect the said traitorous compassings, imaginations and intentions of him, the said Aaron Burr, against the said United States, and to carry on the war thus levied as aforesaid against the said United States, the said Aaron Burr, with the multitude last mentioned, at the island aforesaid, in the said county of Wood, within the Virginia district aforesaid, and within the jurisdiction of this court, did array themselves in a warlike manner, with guns and other weapons, offensive and defensive, and did proceed from the said island down the river Ohio, in the county aforesaid, within the Virginia district and within the jurisdiction of the court, on the said eleventh day of December, in the year one thousand eight hundred and six aforesaid, with the wicked and traitorous intention to descend the said river and the river Mississippi, and by force and arms traitorously to take possession of a city commonly called New Orleans, in the territory of Orleans, belonging to the United States, contrary to the duty of their said allegiance and fidelity, against the constitution, peace and dignity of the said United States, and against the form of the act of the Congress of the United States in such case made and provided.

HAY, Attorney of the United States, for the Virginia District.

JOHN RANDOLPH,

Clerk.46

[46. United States v. Burr, 25 Fed. Cas. No. 14,693, holding that an overt act must be alleged in an indictment for treason in levying war against the United States and that the charging a defendant in general terms with having levied war is not sufficient. The above form is a copy of the indictment under which Aaron Burr was tried and found "not guilty."]

#### FORM 141.

#### Treason.

Indictment in the Circuit Court of the United States of America in and for the Pennsylvania District of the Middle Circuit. The grand inquest of the United States of America, for the Pennsylvania District, upon their respective oaths and affirmations, do present that John Fries, late of the county Bucks, in the District of Pennsylvania, who, being an inhabitant and residing within the said United States, to wit, in the district aforesaid and under the protection of the laws of the said United States, and owing allegiance and fidelity to the same United States, not having the fear of God before his eyes, nor weighing the duty of his said allegiance and fidelity, but being moved and seduced by the instigation of the devil, wickedly devising and intending the peace and tranquility of the said United States to disturb, on the 7th day of

March, in the year of our Lord one thousand seven hundred and ninety-nine, at Bethlehem, in the county of Northampton, in the district aforesaid, unlawfully, maliciously and traitorously did compass, imagine and intend to raise and levy war, insurrection and rebellion against the said United States; and to fulfil and to bring to effect the said traitorous compassings, imagination, and intentions of him, the said John Fries, he, the said John Fries, afterwards, that is to say, on the said 7th day of March, in the said year of our Lord one thousand seven hundred and ninety-five, at the said county of Northampton, in the district aforesaid, with a great multitude of persons, whose names at present are unknown to the grand inquest aforesaid, to a great number, to wit, to the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, clubs, staves, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States, and then and there, with force and arms did falsely and traitorously, and in a warlike and hostile manner array and dispose themselves against the said United States, and then and there, with force and arms, in pursuance of such their traitorous intentions and purposes aforesaid, he, the said John Fries, with the said persons so as aforesaid traitorously assembled and armed and arrayed in manner aforesaid, most wickedly, maliciously and traitorously did ordain, prepare and levy public war against the United States, contrary to the duty of his said allegiance and fidelity. against the constitution, peace and dignity of the said United States, and also against the form of the act of Congress of the said United States in such case made and provided.

#### WILLIAM RAWLE,

Attorney of the United States, for the Pennsylvania District.47

[47. In re Fries, Fed. Cas. No. 5,126.]

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